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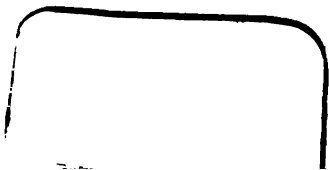
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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

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SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,

LAW PUBLISHERS AND LAW BOOKSELLERS.

1881.

121675

JUL 29 1942

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 JOHN W. HENRY.

* Chief Justice at the November Term, 1879. ‡ Died December 17, 1879.

† Chief Justice at the May Term, 1880.

§ Appointed December 20, 1879, to succeed S. E. Perkins.

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AMASA COBB.

NEW YORK.

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ISAAC G. GORDON,
EDWARD M. PAXSON,
WARREN J. WOODWARD,
JOHN TRINKEY,
JAMES P. STERRETT.

* Died May 14, 1880.

† Appointed May 20, 1880, vice Sanford E. Church.

‡ Appointed May 24, 1880, vice Charles J. Folger, appointed Chief Judge.

§ For the year commencing Feb. 9, 1879. ¶ For the year commencing Feb. 9, 1880.

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EDWARD G. RYAN, *Chief Justice*.
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 DAVID TAYLOR,
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^{*} Resigned October 1, 1890.

[†] Appointed October 2, 1890, and elected at ensuing general election.

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CASES
IN THE
SUPREME COURT
OF
ALABAMA.

WALKER V. STATE.

(68 Ala. 49.)

Criminal law — burglary — entry — auger.

One who, intending to steal shelled corn, bores a hole through the floor of a corn-crib from the outside, and thus draws the corn into a sack below is guilty of burglary.

CONVICTION of burglary. The opinion states the case.

H. C. Tompkins, attorney-general, for State.

BRICKELL, C. J. The statute (Code of 1876, § 4343) provides, that "any person who, either in the night or day time, with intent to steal, or to commit a felony, breaks into and enters a dwelling-house, or any building, structure or inclosure within the curtilage of a dwelling-house, though not forming a part thereof, or into any shop, store, warehouse, or other building, structure or inclosure in which any goods, merchandise or other valuable thing is kept for use, sale, or deposit, provided such structure, other than a shop, store, warehouse or building, is specially constructed or made to

keep such goods, merchandise, or other valuable thing, is guilty of burglary," etc.

The defendant was indicted for breaking into and entering "a corn-crib of Noadiah Woodruff and Robert R. Peeples, a building in which corn, a thing of value, was at the time kept for use, sale, or deposit, with intent to steal," etc. He was convicted; and the case is now presented on exceptions taken to instructions given, and the refusal of instructions requested, as to what facts will constitute a breaking into and entry, material constituents of the offense charged in the indictment. The facts, on which the instructions were founded, are: that in the crib was a quantity of shelled corn, piled on the floor; in April, or May, 1878, the crib had been broken into, and corn taken therefrom, without the consent of the owners, who had the crib watched; and thereafter the defendant was caught under it, and on coming out, voluntarily confessed that about three weeks before he had taken a large auger, and going under the crib, had bored a hole through the floor, from which the corn, being shelled, ran into a sack he held under it; that he then got about three pecks of corn, and with a cob closed the hole. On these facts, the City Court was of opinion, and so instructed the jury, that there was such a breaking and entry of the crib, as would constitute the offense, and refused instructions requested asserting the converse of the proposition.

The material changes the statute has wrought as to the offense of burglary, as known and defined at common law, are as to the time and place of its commission. An intent to steal, or to commit a felony, are the words of the statute, while an intent to commit a felony were the words of the common law. Under our statutes, a felony is defined as a public offense, punished by death, or by imprisonment in the penitentiary; while public offenses otherwise punishable are misdemeanors. The larceny of other than personal property particularly enumerated, and under special circumstances, the property not exceeding the value of \$25, is petit larceny, and a mere misdemeanor. The intent to steal, as an element of burglary, is therefore made the equivalent of an intent to commit a felony, though the value of the thing intended to be stolen may be less than \$25, and its larceny a misdemeanor.

The statute employs the words, "breaks into and enters;" and these are borrowed from the common-law definition of burglary. They must be received with the signification, and understood in

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the sense given them at common law. "There must, in general," says Blackstone, "be an actual breaking, not a mere legal *clausum fregit* (by leaping over invisible ideal boundaries, which may constitute a civil trespass), but a substantial and forcible irruption." The degree of force or violence which may be used is not of importance—it may be very slight. The lifting the latch of a door; the picking of a lock, or opening with a key; the removal of a pane of glass, and indeed, the displacement or unloosing of any fastening, which the owner has provided as a security to the house, is a breaking—an actual breaking—within the meaning of the term as employed in the definition of burglary at common law, and as it is employed in the statute. In *Hughes'* case, 1 Leach C. C., case 178, the prisoner had bored a hole with a center-bit through the panel of the house door, near to one of the bolts by which it was fastened, and some pieces of the broken panel were found within-side the threshold of the door, but it did not appear that any instrument except the point of the center-bit, or that any part of the prisoner's body, had been within-side the house, or that the aperture made was large enough to admit a man's hand. The court were of opinion that there was a sufficient breaking, but not such an entry as would constitute the offense.

The boring the hole through the floor of the crib was a sufficient breaking, but with it there must have been an entry. Proof of a breaking, though it may be with an intent to steal or the intent to commit a felony, is proof of one only of the facts making up the offense, and is as insufficient as proof of an entry through an open door without breaking. If the hand or any part of the body is intruded within the house the entry is complete. The entry may also be completed by the intrusion of a tool or instrument within the house, though no part of the body be introduced. Thus, "if A breaks the house of B in the night time, with intent to steal goods, and breaks the window and puts in his hand, or puts in a hook or other engine to reach out goods, or puts a pistol in at the window, with an intent to kill, though his hand be not within the window, this is burglary." 1 Hale, 555. When no part of the body is introduced—when the only entry is of a tool or instrument introduced by the force and agency of the party accused, the inquiry is whether the tool or instrument was employed solely for the purpose of breaking, and thereby effecting an entry, or whether it was employed not only to break and enter, but also to aid in the

consummation of the criminal intent and its capacity to aid in such consummation. Until there is a breaking and entry the offense is not consummated. The offense rests largely in intention, and though there may be sufficient evidence of an attempt to commit it, which of itself is a crime, the attempt may be abandoned — of it there may be repentance before the consummation of the offense intended. The breaking may be at one time and the entry at another. The breaking may be complete, and yet an entry never effected. From whatever cause an entry is not effected, burglary has not been committed. When one instrument is employed to break, and is without capacity to aid otherwise than by opening a way of entry, and another instrument must be used, or the instrument used in the breaking must be used in some other way or manner to consummate the criminal intent, the intrusion of the instrument is not of itself an entry. But when, as in this case, the instrument is employed not only to break, but to effect the only entry contemplated and necessary to the consummation of the criminal intent; when it is intruded within the house, breaking it, effecting an entry, enabling the person introducing it to consummate his intent, the offense is complete. The instrument was employed not only for the purpose of breaking the house, but to effect the larceny intended. When it was intruded into the crib the burglar acquired dominion over the corn intended to be stolen. Such dominion did not require any other act on his part. When the auger was withdrawn from the aperture made with it the corn ran into the sack he used in its asportation. There was a breaking and entry, enabling him to effect his criminal intent without the use of any other means, and this satisfies the requirements of the law.

Let the judgment be affirmed.

Judgment affirmed.

CARTER V. STATE.

(68 Ala. 52.)

Witness — competency of child.

A negro girl, nine years old, offered as a witness, said in answer to questions to test her competency, that "she did not know what the Bible was; had been to church but once and that was to her mother's funeral; did not know

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what book it was she laid her hand on when sworn; had heard tell of God, but did not know who it was; and that if she swore to a lie she would be put in jail, but did not know she would be punished in any other way. *Held*, incompetent. (See note, p. 7.)

CONVICTION of carnal abuse of a female child. The opinion states the facts.

H. C. Tompkins, attorney-general, for State.

MANNING, J. The rule insisted on in all the books is, that "the admissibility of children as witnesses depends, not merely upon their possessing a competent degree of understanding, but also, in part, upon their having received such a degree of religious instruction as not to be ignorant of the nature of an oath, or of the consequences of falsehood." 1 Phillips on Ev. (4th Am. ed.), with Cowen & Hill's notes, 11, 12. In *Rex v. Williams*, 7 C. & P. 298, a child eight years old, who, up to the time of the event of which she was to testify, had received no religious training, nor had ever heard of God, or of future rewards and punishments, and had never prayed; and who, in the interval (about sixteen weeks) between that time and the trial, had been twice visited and instructed by a clergyman, as to the nature and obligation of an oath, but still appeared manifestly to have no real understanding on the subject of religion, or a future state, was not permitted to testify. In Massachusetts, it was said, in 1813, that by the later opinions it was the settled law at that time, "if an infant appear, on examination by the court, to possess a sufficient sense of the wickedness and danger of false swearing, he may be sworn, although of ever so tender an age. The credit of the witness * * * is to be judged of by the jury, from the manner of his testimony, and other circumstances." *Com. v. Hutchinson*, 10 Mass. 225.

If, after the event of which he is to testify, a child, previously ignorant, is by instruction made to understand the nature of the obligation to speak the truth which is imposed by an oath, he is then a competent witness. And it has been held, that the trial of a criminal cause may be postponed, when an important witness for the prosecution is a child, that he or she may in the mean time receive such instruction. 1 Leach, 430, note; *Rex v. Nicholas*, 2 C. & K. 246. But disapprobation of such a practice has been expressed by other judges. In Cowen & Hill's Notes to Phillips on Evidence,

supra, the case of one Jenner is cited, in which a girl nine years old, very intelligent, but ignorant of the nature of an oath, and of the moral penalty of false swearing, was instructed by the judge on the spot, and then sworn. 1 Vol. 11, note 8. And so essential is it to the repression of crime, that the public shall not, in all cases, be deprived of the testimony of those, however low in the scale of civilization, who have memory and intelligence enough to relate what they have seen and know, that formerly a statute of this State made it the duty of the presiding judge, whenever a negro slave was a witness, "to explain to him or her the nature of the oath to be administered, and to state to him or her the punishment for swearing falsely;" it being assumed that such instruction would be sufficient to qualify those most ignorant in these particulars, who were not deficient of mind, to be sworn and give evidence to be considered by the jury. Clay's Dig. 473, § 9.

When, however, a child of tender years is produced as a witness, it is the duty of the presiding judge to examine him or her, without the interference of counsel further than the judge may choose to allow, in regard to the obligation of the witness' oath; and in proper cases, to explain the same to one intelligent enough to comprehend what he says; and then to determine whether or not such child shall be sworn and permitted to testify.

In this case, an examination, that seems to us to have been inadequate, was had. The witness was a little negro girl, about nine years old; and to questions put by counsel for defendant, she "answered, that she did not know what the Bible was; had never been to church but once, and that was to her mother's funeral; did not know what book it was she laid her hand on when sworn; had heard tell of God, but did not know who it was; and said, if she swore to a lie, she would be put in jail, but did not know she would be punished in any other way." This is all the record contains on this subject. And thereupon the judge, without more, permitted her to be sworn and give evidence. Seeing how fully her testimony was corroborated, and the apparent artlessness with which it was given, the jury probably yielded entire credence to what she said; and we regret we cannot permit the verdict and judgment to stand. But it is obvious that according to the rules of evidence which courts are bound by, the answers elicited from the witness did not show her to be competent. Counsel for defendant obtained from her just so much as tended to confirm the con-

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trary conclusion, and there the examination was permitted to stop, when probably a few questions, put with the design to enable the formation of an impartial judgment, would have disclosed either that she had a sufficient sense of the wickedness and danger of swearing falsely, or sufficient intelligence to understand instructions on the subject, which the judge might then have given.

Under the rule, and upon the evidence, we are constrained to hold that the Circuit judge erred in permitting this witness to be sworn and testify, and that the judgment must be therefore reversed, and the cause remanded. Let the defendant be kept in custody, until discharged by due course of law.

NOTE BY THE REPORTER.—In *Arnd v. Amuling*, St. Louis Court of Appeals, October, 1879, 1 South. L. J. and Rep. 769, it was held that it is error to question the witness himself as to his religious belief, even after he has been sworn, although formerly it was held otherwise. The court said: "The point raised by this bill of exception is both novel and interesting in this State, as no decision of this court has been cited by the counsel on either side, and it is presumed none exists. The questions are involved in this exception: 1. Whether the witness objected to should have been sworn and examined at all. 2. If examined, whether he should not have been examined in reply to the testimony impeaching his competency, and not before. The general rule regulating the mode of ascertaining and determining the competency of witnesses, objected to on account of 'insensibility to the obligations of an oath from defect of religious sentiment and belief,' is prescribed with great precision by the elementary writers and more recent authors on the law of evidence. Mr. Greenleaf, vol. 1, ch. 2, § 370, treating of the competency of witnesses, says: 'The burden of proof is not on the party adducing the witness to prove that he is a believer, but on the objecting party to prove that he is not. * * * The ordinary mode of showing this is by evidence of his declaration previously made to others—the person himself not being interrogated—for the object of interrogating a witness in these cases, before he is sworn, is not to obtain knowledge of the facts, but to ascertain from his answers the extent of his capacity, and whether he has sufficient understanding to be sworn.' In a very elaborate note to this section, the cases of modern date, both English and American, are collected and summarized in part as follows: 'The witness himself is never questioned, in modern practice, as to his religious belief, though formerly it was otherwise. 1 Swift's Dig. 739; 5 Mas. 19; 4 Am. Jour. 79, note. It is not allowed after he has been sworn. *The Queen's case*, 2 B. & B. 284. * * * The old cases in which the witness himself was questioned as to his belief have on this point been overruled. Note 1, § 370, 1 Greenl. Ev.; 1 Whart. Cr. Law, §§ 796, 798." Taylor, however, states the rule differently: "One mode, and perhaps the least objectionable mode of proving that a witness is incompetent to take an oath on the ground of want of religious belief, is by furnishing evidence of his atheistical declarations previously made to others; but the witness may himself be interrogated on the subject, either before he is sworn upon the *voir dire*, or even, as it would seem, after having been sworn in the cause." The error in the principal case, however, was held harmless, because after the witness had been questioned the opposite party declined an offer to permit him to produce testimony.

WASHINGTON V. STATE.

(88 Ala. 135.)

Constitutional law—jury not judges of the law in criminal case.

In a criminal case the jury are not judges of the law.*

CONVICTION of assault with intent to murder. The defendant asked the court to give the following charges: "1. The jury are the judges of the law and facts in a criminal prosecution. 2. The jury are the judges both of the law and the facts in a criminal case, and are not bound by the opinion of the court. The jury may judge for themselves, and if they feel it their duty to differ from the court on a question of law they may find their verdict accordingly."

Thomas R. Roulhac and Thomas Seay, for defendant.

H. C. Tompkins, attorney-general, for State.

MANNING, J. The question of law raised by the exception to the refusal of the Circuit judge to give to the jury the first two charges asked for the defendant, has been long since settled by the decisions of this court. Said DARGAN, C. J., in *Batre v. State*, 18 Ala. 123, "the jury are not the constituted judges of the law in any case, unless they be made so by statute. The whole theory of our jurisprudence disproves it. They cannot judge of the competency of evidence, and order its admission, in opposition to the opinion of the court. The defendant has, too, an unquestionable right to ask the court to instruct the jury on any point in the cause that may be favorable to him; and it is the bounden duty of the court to give the instructions, if they be in accordance with the law. And should the court refuse," or its instruction to the jury be erroneous, to the injury of the defendant, the Supreme Court, upon the cause being properly brought before it, would be bound to reverse the judgment for the error committed by the presiding judge. The Supreme Court must "either reverse or affirm the decision of the court below, as they may find it to be in accordance with, or op-

* See *Kane v. Com.* (89 Penn. St. 522), 33 Am. Rep. 757, and note, 791.

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posed to the law. This view, to our mind, is conclusive, that the judge is the only person legally authorized to determine the law."

* * * "We know," continues the chief-justice, "it has been said by courts of respectable authority, that the jurors, in a criminal case, are the judges of the law, as well as the facts; but we think this opinion arises from not distinguishing between the powers that a jury may assume to exercise, and the duties confided to them by law. The law does not constitute them the judges, yet they may assume the responsibility of rendering a verdict contrary to law, as given to them in charge by the court; and if they do so in a criminal case, and acquit the prisoner, their verdict is conclusive, for it is not under the control of the court. This power, however, that they may exercise upon their own responsibility, does not constitute them judges of the law in a legal sense; but on the contrary, in a legal point of view, they violate the law in rendering a verdict contrary to the rules laid down to them by the court."

What we have quoted from the opinion of Chief Justice DARGAN is so well expressed, that we have thought we could not do better than reproduce it on the present occasion. The Circuit judge did not err in refusing to give either of the first two instructions asked on behalf of respondent.

[Omitting a minor question.]

Let the judgment of the Circuit Court be affirmed.

Judgment affirmed.

LOWDER V. STATE.

(68 Ala. 143.)

Criminal law — burglary — by servant.

A servant and office boy of an attorney at law, intrusted with the key of the front door of the office, and entering at night by using the key, with intent to steal, the attorney sleeping, according to custom, in an inner room, is guilty of burglary, but not so if the boy is in the habit of sleeping in the office, to the knowledge of his employer, and enters to go to bed, and after entering forms the design to steal.

CONVICTION of burglary. The opinion states the facts.

J. Gindrat Winter, for defendant.

H. C. Tompkins, attorney-general, for the State.

MANNING, J. Appellant was indicted for burglary, in entering at night through the outer front door the office of Sayre & Graves, attorneys at law, from which an open door let into an adjoining bed-room, where Mr. Sayre lay, having gone to bed. The evidence tended to show that defendant went from the office after entering it into the bed-room, to steal money from the pocket-book of Mr. Sayre, which he had placed between the mattresses of the bed on which he was lying. And the defense is, that being a servant of Sayre & Graves, and intrusted as such by them with the key of their office, defendant was not guilty of burglary.

According to Mr. Sayre's testimony, defendant was then and previously in the employment of Sayre & Graves "as a servant in witness' bed-room, and as an office boy to their law office, the same mentioned in the indictment," and had received from them, to be used "for the purpose of his employment," a key to the office front door, and that he entered through said front door, and by use and means of said key defendant could have ingress into said office at will; but (his) duties * * * did not call him there at night," though he "was not restricted or forbidden from using said key and coming into said office at night, nothing being said to him as to that." Whether or not he was in the habit of sleeping there at night is left in doubt by the evidence.

In 2 Russell on Crimes (Sharswood's ed. of 1877), 7, it is said: "It will also amount to a burglary if a servant in the night time open the chamber door of his master or mistress, whether latched or otherwise fastened, and enter for the purpose of committing murder or rape, or with any other felonious design." In *Edmond's* case, in the time of James I (Reports of Sir Richard Hutton, in black letter, p. 20), the jury returned this special verdict: "We find that Richard Heydon, and Christian, his wife, were both in bed, and at rest in an upper chamber of the mansion-house of the said Richard Heydon; and that the said William Edmonds then was and yet is the servant and apprentice of the said Richard, and that he then lay in another chamber of the said house remote from the bed-chamber of his said master and dame, and that there was a door with a latch at the stairs' foot of the said bed-chamber of the

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said Heydon, but none at the stairs' head, being the entrance into the said bed-chamber of the said Heydon. We find that the said William, at the said time in the indictment, drew the latch of the stair-foot door and opened the said door, being then latched, and went up the stairs and entered the bed-chamber of his said master, with an intent to murder the said Heydon, and that he did then and there" wound, etc. Of the ten judges to whom the case was submitted nine "agreed that it was burglary," and the other doubted. Similar to this are the cases of *Gray*, 1 Str. 481, and *Bowen*, 4 Cr. Cir. Ct. 604, in which the judgments were the same.

In *Cornwall's* case, 2 Str. 881, "defendant was a servant in the house where the robbery was committed, and in the night time opened the street door and let in the other prisoner, and showed him the side-board, from whence the other prisoner took the plate; then the defendant opened the door and let him out, but did not go out with him, but went to bed." Whether this was burglary in the servant was doubted at the trial, but at a meeting of all the judges they unanimously held "that it was burglary in both, and not to be distinguished from the case that had been often ruled, * * * that if one watches at the street-end while the other goes in it is burglary in all."

In this latter case the servant did not break into and enter the house; he was already in and did not go out, and the other did not himself do any house-breaking to get in; he only entered through a door which a servant of the house intrusted with the key opened for him. But the idea, though not expressed, upon which this opinion was based, seems to have been that the outsider was guilty of burglary in obtaining entrance by the aid of the unfaithful servant as truly as if it had been effected by an inanimate instrument, and it followed that the servant was guilty of the same offense, because he was present, aiding and abetting. Would there have been any question made whether the servant was guilty or not, if instead of being and staying within the house he had come with his confederate to the door on the outside, and had opened it with the key intrusted to him, and both had gone in and stolen the plate? If not, why should not the servant, in view of the other cases above cited, be held guilty of burglary if without a confederate he had opened and gone into the house alone, and immediately stolen the plate himself? An opening for this purpose was no less unlawful, and it would appear as much a burglary as an opening to

let in another thief. By the common law a servant would be guilty of larceny — of the felonious taking and carrying away — of the money or goods of his master, even if they had been handed and intrusted to him to be carried to another person, by appropriating them to his own use. And so, though he might have the privilege of opening and entering his master's mansion-house to go to bed therein, he would, it seems to me, be guilty of burglary if he unlocked and entered it in the night time with the intent to rob, and did then commit robbery therein; only, to justify a conviction in such a case the jury ought to be satisfied by the evidence beyond a reasonable doubt, that the intent to rob existed when the house was entered, not formed afterward.

Doubt is cast upon this view by a passage of Sir Matthew Hale's in commenting on some statutes of Elizabeth's reign, in which he says: "If the servant unlatch a door or turn a key in a door in the house, and steal goods out of that room; * * * yet, it seems to me, the servant shall not thereupon be ousted of his clergy, for the opening the door in this manner is within his trust, and so no breaking of the house nor robbery, within this act. * * * But if a servant break open a door, whether outward or inward, * * * and steal goods, this is a robbery and breaking the house within the statute, * * * for such a breaking, though by a servant in the night, would make burglary, for such an opening is not within his trust." 2 Hale's P. C. 354, 355. Of these passages it is remarked in Russell on Crimes (Sharswood's ed. of 1877), vol. 2, p. 11: "It seems to have been considered that the question whether such act would amount to a breaking must depend upon the point whether the door might have been opened by the servant in the course of his trust and employment." But doubt of this is intimated in a note, added with a *sed quære*, and reference to *Edmund's case, supra*. We have therefore supposed we might consider the question as not settled by the passage in the Pleas of the Crown.

We are of the opinion that the charge given by the judge of the City Court to the jury was upon this point as favorable to the appellant as the law would allow. Of course if he went in only to go to bed, and had the right to do so from his employers, or was accustomed to sleep there at night with their knowledge and without objection, he would not be guilty of burglary, though after entering the office for that purpose only he formed the design to steal.

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The charge was asked for appellant, and refused, that upon the evidence they must find the defendant not guilty. And we think it ought to have been given. There was no evidence that defendant had opened the door of the office at all, for there was none that it was shut before he entered.

For the error of refusing this charge the judgment of the Circuit Court must be reversed and the cause be remanded. Let the defendant remain in custody until discharged by due course of law.

Reversed and remanded.

 MOBILE AND GIRARD RAILROAD COMPANY V. COPELAND.

(53 Ala. 219.)

Carrier — common — liability for goods beyond his terminus.

A common carrier, receiving goods for transportation which are consigned to a point beyond his terminus, is liable for non-delivery at the destination, in the absence of any express agreement.*

ACTION against a common carrier for non-delivery of goods intrusted to him for transportation, and consigned to a point beyond the terminus of his own line. The receipt given for them was unconditional. The defendant proved delivery to the carrier at the end of his line. The plaintiff had judgment below.

Norman & Wilson, for appellant, cited *Rawson v. Holland*, 59 N. Y. 611; s. c., 17 Am. Rep. 394; *Reed v. United States Express Co.*, 48 N. Y. 462; s. c., 8 Am. Rep. 561; *Skinner v. Hall*, 60 Me. 477; *Perkins v. Portland, S. & P. Railroad Co.*, 47 id. 573; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318; *Gray v. Jackson*, 51 N. H. 9; s. c., 12 Am. Rep. 1; *Burroughs v. Norwich Railroad Co.*, 100 Mass. 26; s. c., 1 Am. Rep. 78; *Baltimore Railroad Co. v. Schumacher*, 29 Md. 168; *McMillan v. Mich. S. Railroad Co.*, 16 Mich. 79; *Am. Express Co. v. Second National Bank*, 69 Penn. St. 394; s. c., 8 Am. Rep. 268; *Hood v. N. Y. & N. H. Railroad Co.*, 22 Conn. 1; *Converse v. Norwich & N. Y. Trans. Co.*, 33 id. 177; *Law-*

* To same effect, *Erie Ry. Co. v. Wilcox* (84 Ill. 239), 25 Am. Rep. 461.

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rence v. Winona Railroad Co., 15 Minn. 390; s. c., 2 Am. Rep. 130; *Mullasky v. Phil. Railroad Co.*, 3 Phila. 114; *M. & W. P. Railroad Co. v. Moore*, 51 Ala. 576; *So. Express Co. v. Hess*, 53 id. 19; *Ellsworth v. Tartt*, 26 id. 733; Redf. on Car., chap. 14.

W. D. Wood, contra, cited *Muschamp v. Lancaster & Preston Ry.*, 8 M. & W. 421; *Weed v. S. & S. Ry.*, 19 Wend. 534; *F. & M. Bank v. Ch. Transportation Co.*, 23 Vt. 186; *McCluer v. M. & L. R. R.*, 13 Gray, 124; *Noyes v. R. & B. R. R.*, 27 Vt. 110; *Wilcox v. Parmelee*, 3 Sandf. 610; *Nashua Lock Co. v. W. & N. R. R.*, 48 N. H. 339; s. c., 2 Am. Rep. 242; *Gray v. Jackson*, 51 N. H. 9; s. c., 12 Am. Rep. 1; *Foy v. T. & B. R. R.*, 24 Barb. 382; *Schroeder v. Hudson River R. R.*, 5 Duer, 55; *Kyle v. Laurens R. R.*, 10 Rich. 382; *Central R. R. v. Copeland*, 24 Ill. 335; *Gt. Western R. R. v. McComas*, 33 id. 185; *Angle v. M. & M. R. R.*, 9 Iowa, 487; *St. John v. Van Santvoord*, 25 Wend. 660.

BRICKELL, C. J. The liability of a common-carrier, receiving goods for transportation, directed to a place beyond the terminus of his own line or route, who does not by express agreement limit his duty and responsibility for the non-delivery of the goods at the point of destination, is for the first time presented for the consideration and decision of this court. The importance of the question is manifest, and it is to be regretted that it is embarrassed by an irreconcilable conflict of authority in this country. In *Ellsworth v. Tartt*, 26 Ala. 733, as in *M. & W. R. R. Co. v. Moore*, 51 id. 394, the question was as to the liability of an intermediate carrier, for a loss or injury not occurring on his own route; and it was held, that in the absence of a special contract, or of some special relation between carriers having control of different parts of a line or route of transportation, each carrier is liable only for a loss or injury on his own route or line. We have no inclination to depart from these decisions, applied to the particular facts of the cases; but it is obvious they do not meet the question now presented.

The leading case in England, upon this question — that of *Muschamp v. L. & P. Ry. Co.*, 8 M. & W. 421 (which has been approved and followed, in numerous subsequent cases), settled the rule, that where a carrier receives goods, directed to a place beyond the terminus of his own route, without limiting his liability by express agreement, by the acceptance of the goods he assumes the duty,

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and incurs the obligation, to deliver them safely at the point of destination. A number of the American courts have adopted and followed this rule, and a number have rejected and disapproved it, as unjust to the carrier, and unnecessary upon any considerations of public policy. The authorities are collected in the recent work. Hutchinson on Carriers, §§ 148-9, and notes. To review them is not possible, without extending this opinion to an unusual length, and we shall simply express briefly the reasons which induce us to adhere to the rule laid down in *Muschamp's* case.

It must be regarded as settled, that a carrier, though a corporation, chartered by the laws of a particular State, having a known and defined line of transportation, may contract for the safe carriage and delivery of goods to a point beyond the terminus of his line, within or without the State; and if such a contract is made, all connecting lines stand in relation of his agents, for whose defaults he is responsible to the owner of the goods. Hutchinson on Carriers, § 145. When goods are consigned to a place on his own line of transportation, the known and established duty of a carrier is to deliver them at that place, and to the person who has the right to receive them. A mistake, however innocent, in making delivery, either to the proper person, or at the proper place, involves him in liability. When he accepts goods, directed to a place beyond the line of his route, not limiting his liability, what difference is there in the measure of his duty and liability? To assume that he is a carrier only to the terminus of his own route, and from thence a forwarder, is, as was said by Lord ABINGER, in *Muschamp's* case, to assume that the shipper and carrier enter into "a very elaborate kind of contract; it is, in substance, giving to the carriers a general power along the whole line of route, to make, at their pleasure, fresh contracts, which shall be binding upon the principal who employed them." Unless the shipper in person attends the goods, and enters into these new contracts, they are practically unilateral; and it is difficult to believe that any shipper ever intends assenting to a contract with the receiving carrier which involves such consequences. When, without a special contract, he intrusts his property to the receiving carrier, he understands that the duty and obligation of the carrier is to deliver safely at the point of destination. If that be beyond the line of the receiving carrier, he understands that the receiver must have some connection with other carriers, by whose agency the delivery is to be made. With these he

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has no connection or communication, nor can it be intended that he should have. When there is a failure to deliver, to compel the owner to pass the carrier with whom he contracted, to whom he made delivery, because it may be that there was no default on his part, and search through the entire line of transportation, until he finds the delinquent, seems to us inconsistent with the principles which underlie the whole doctrine upon which are founded the duty and liability of common carriers. As in this case, the line of the receiving carrier may cover but an insignificant part of the entire line of transportation, and before the point of destination is reached, numerous carriers must intervene; to compel the owner to pass the carrier with whom he first dealt, because he was guilty of no delinquency, and travel over the whole line until he finds who of the connecting carriers was in default, is to condemn him to almost certain loss. The true doctrine, that which is most consistent with all the principles which govern the liability and duty of carriers, and which seems to us required by the same necessity and public policy upon which these principles are founded, is, that a common carrier who receives goods destined for a place beyond his own line of transportation, not expressly otherwise limiting his duty and liability, must be regarded as contracting for a delivery at the point of destination. It cannot be said this rule is more unjust to the carrier, than that which holds him liable as an *insurer*, for loss or injury not occurring by the act of God, or of the public enemy. Nor is it more unjust than the rule which compels him to receive all goods within the scope of his business, which are offered to him for transportation on his own line. The injustice seems to us to be visited upon the public, who are compelled to employ carriers, if the opposite rule is adopted.

Let the judgment of the Circuit Court be affirmed.

Judgment affirmed.

LOEB V. PETERS.

(83 Ala. 942.)

Sale—stoppage in transit—sub-purchaser—transfer of bill of lading as collateral security.

The seller of goods may stop them in transit on account of the purchaser's insolvency existing before, but not known to the seller until after the sale.

The right of stoppage in transit is lost if the purchaser has sold the goods and indorsed the bill of lading to a sub-purchaser for value in good faith, but the sub-purchaser's knowledge of the original insolvency bears on the question of his good faith.

The transfer of a bill of lading as mere collateral security for a pre-existing debt does not make the transferee a purchaser for value.

TRIAL of right of property in goods. The opinion states the case.

Sayre & Graves, for appellants.

L. A. Shaver, contra.

MANNING, J. Munter & Brother, being largely in debt, and insolvent, by an order requesting shipment to them, bought of plaintiffs, J. M. Peters & Brother, of Virginia, twenty-five boxes of tobacco; which they accordingly sent as directed, to Munter & Brother, at Montgomery, Alabama, by railroad, forwarding to them by mail a bill of lading therefor. On receipt of this, several days before the boxes arrived, Munter & Brothers indorsed it, and transferred their right to the goods to J. Loeb & Brother, who gave them credit for the same, on a debt past due, which Munter & Brother owed them. There was no other consideration for this transfer. Soon afterward, Peters & Brother, being informed of the insolvency of Munter & Brother, and claiming the right to stop the tobacco *in transitu*, demanded it of the carrier, the South & North Alabama Railroad Company, and sued the same in detinue for it, having first offered to pay the freight money. Loeb & Brother intervened as claimants, and thereby obtained possession of the goods, whereupon, the suit was prosecuted against them, to a verdict and judgment in favor of Peters & Brother, from which Loeb & Brother have appealed to this court.

We do not concur in the opinion expressed in *Rodgers v. Thomas*, 20 Conn. 54, that a vendor of goods, in transit to an insolvent vendee, cannot stop them on the way, before delivery, unless the insolvency of the vendee occurred after the sale to him of the goods. We think, with the Supreme Court of Ohio, that the vendor may stop the goods upon a subsequent discovery of insolvency existing at the time of the sale, as well as upon a subsequent insolvency. If there be a want of ability to pay, it can make no difference, in justice or good sense, whether it was produced by causes, or shown by acts, at a period before or after the sale. *Benedict v. Schastle*, 12 Ohio St. 515; *Reynolds v. Boston M. R. R. Co.*, 43 N. H. 589; *O'Brien v. Norris*, 16 Md. 122; *Blum v. Marks*, 21 La. Ann. 268. The best definition of the right which we have seen is that in Parsons' Mercantile Law, as follows: "A seller who has sent goods to a buyer at a distance, and after sending them, finds that the buyer is insolvent, may stop the goods at any time before they reach the buyer. His right to do this is called the right of stoppage *in transitu*." Chap. X, p. 60.

If before this right is exercised, the buyer sells the goods, and indorses the bill of lading for them to a purchaser in good faith and for value, the right of the first vendor to retake them is extinguished. *Lickbarrow v. Mason*, 1 Smith's Lead. Cases, 388. Evidence therefore, that Loeb & Brother knew, when they took a transfer of the bill of lading, that Munter & Brother were insolvent, was relevant and proper to show, in connection with other testimony, that Loeb & Brother were not *bona fide* purchasers. And there was no error in permitting a witness to testify what one of that firm had previously said, tending to show such knowledge, when he was giving evidence in another cause. Statements and declarations, relevant to the matter in hand, which have been made by a party to a cause, may be proved against him, without his adversary being compelled to use such party as a witness in a suit in which he is interested.

The two judgments against Munter & Brother, in favor of creditors, confessed by the former before the tobacco had reached its destination, and the seizure upon execution the next day of property of Munter & Brother, by the sheriff, tended to prove their insolvency; and the evidence of those facts was therefore properly admitted.

The transfer of a bill of lading, as a collateral to previous obli-

gations, without any thing advanced, given up, or lost on the part of the transferee, does not constitute such an assignment as will preclude the vendor from exercising the right of stoppage *in transitu*. Said BRADLEY, C. J., in *Lesassier v. The South-western*, 2 Woods, 35: "Nothing short of a *bona fide* sale of the goods for value, or the possession of them by the vendee, can defeat the vendor's right of stoppage *in transitu*; and hence it has been held, that an assignee in trust for creditors of the insolvent vendee is not a purchaser for value, and consequently takes subject to the exercise of any right of stoppage *in transitu* which may exist against the assignor. *Harris v. Pratt*, 17 N. Y. 249." Wherefore it was held in the latter case, that an attachment in the suit of the vendee's creditor, of goods landed by the carrier upon a wharf-boat at the place of delivery, did not prevent the vendor from stopping them *in transitu*. See also *O'Brien v. Norris*, 16 Md. 122; *Naylor v. Dennie*, 8 Pick. 199; *Nicholls v. Lefevre*, 2 Bing. (N. C.), 83. The doctrine is based upon the plain reason of justice and equity, enunciated in *D'Aquila v. Lambert*, 2 Eden Ch. 77, that "one man's property should not be applied to the payment of another man's debt." The right itself is regarded as an extension merely of the lien for the price, which the seller of goods has on them while remaining in his possession; which lien the courts will not permit to be superseded, before the vendee, who has become insolvent, obtains possession, unless in the meantime the goods have been sold to a person who, in good faith, has paid value for them, and so would be a loser by his purchase, if that were held invalid. Appellants having only credited Munter & Brother on a debt previously due from them, with the price of the tobacco, have nothing more to do, in order to get even, than to debit them with the same sum, for the non-delivery of the goods in consequence of the defect in Munter & Brother's title.

The case of *Crawford v. Kirksey*, 55 Ala. 282, so much relied on by appellants, is wholly unlike this. The question of stoppage *in transitu* was in no way involved in it. The controversy there was, whether a conveyance by a debtor, in a failing condition, of property which was indisputably and entirely his, in payment of a debt to one of his creditors, was not void as to the others; and this court decided that the law permitted such a preference, and that the transaction was not fraudulent in fact.

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It results from what we have said, that there was no error in the charges to the jury.

Let the judgment of the Circuit Court be affirmed.

Judgment affirmed.

BOSWELL V. STATE.

(68 Ala. 307.)

Criminal law — homicide — insanity — delusion — evidence — burden of proof.

The defense of insane delusion, in a criminal case, prevails only when the imaginary state of facts would justify or excuse the act if it was real.

The doctrine of moral insanity, or irresistible impulse, co-existing with mental sanity, has no foundation in psychology nor support in law.

There must be a preponderance of evidence of insanity, in a criminal case, to overcome the presumption of sanity. (*See note, p. 32.*)

CONVICTION of murder. Defense of insanity. The opinion states the points.

Geo. W. Parsons, for prisoner.

H. C. Tompkins, attorney-general, for the State.

STONE, J. [Omitting a minor point.] It is certainly true that insanity, properly proved, is a complete answer to a criminal charge. An unsound mind cannot form a criminal intent; and as crime includes both act and intent, an indispensable constituent is wanting, when the mind of the perpetrator is diseased in that degree which is by the law pronounced insanity. Few subjects have in later times been more discussed than diseases of the mind. The tendency of modern research has been to accord to mental disorders a wider scope than was formerly acknowledged. Care must be maintained, however, that in commiserating and protecting this pitiable class, which appeals so loudly to our sympathies, we do not break down all legal barriers to crime, and leave society at the mercy of those whose evidence of insanity consists in their supreme depravity. No defense, perhaps, is more easily simulated than this; and hence, when presented, its evidences should be carefully and

considerately scanned; not with a foregone conclusion to disallow it, as a pretense; not with an undue bias in its favor; but with a firm determination, without partiality or prejudice, to give to the testimony submitted its due weight; nothing more, nothing less.

The questions, what degree of insanity will excuse crime; on whom, and to what extent, is cast the duty of making good, or of overturning the defense of insanity in a criminal prosecution, and the measure of proof necessary to that end, have caused the greatest contrariety of judicial opinion. The case of *McNaghten*, 10 Cl. & Fin. 200, came before the British House of Lords for trial; and their lordships submitted certain questions to the judges of England, which were answered by Lord C. J. TINDALL, speaking for all the judges, except Mr. Justice MAULE, who delivered a separate opinion. Among the questions propounded were the following:

1. "What is the law respecting alleged crimes, committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit.

2. "What are the proper questions to be submitted to the jury, when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder for example), and insanity is set up as a defense."

3. "In what terms ought the question to be left to the jury, as to the prisoner's state of mind, when the act was committed."

4. "If a person, under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused."

The answer of the judges was confined to the letter of the questions. They said: "In answer to the first question, assuming that your lordship's inquiries are confined to those persons who labor under such partial delusion only, and are not in other respects insane, we are of opinion, that notwithstanding the party accused did the act complained of, with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the

time of committing such crime that he was acting contrary to law; by which expression, we understand your lordships to mean, the law of the land. As the third and fourth questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jury ought to be told, in all cases, that every man is to be presumed sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved, that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the deceased, solely and exclusively, with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential, in order to lead to a conviction; whereas the law is administered upon the principle, that every one must be taken conclusively to know it, without proof that he does know it. If the accused were conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been, to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course, we think, is correct, accompanied with such observations and explanations as the circumstances of each particular case may require. The answer to the fourth question must of course depend on the nature of the delusion; but making the same assumption as we did before — namely, that he labors under such partial delusion only, and is not in other respects insane — we think he must be considered in the same situation, as to responsibility, as if the facts with respect to which the delusion exists were real. For example, if under the

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influence of delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his defense was, that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

Mr. Justice MAULE answered the first of the questions propounded in the negative. His language was: "There is no law, that I am aware of, that makes persons in the state described in the question not responsible for their criminal acts. To render a person irresponsible for crime, on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong."

It must not be overlooked, that the judges were considering a case of partial insanity; the case of a person afflicted with "insane delusion in respect of one or more particular subjects or persons." And the opinion most favorable to the accused — that of all the judges except Justice MAULE — was, that insane delusion was no justification or excuse of homicide, unless the perpetrator was insanely deluded into the belief of the existence of a fact, or state of facts, which, if true, would justify or excuse the homicide, under the law as applicable to sane persons.

The case from which we have extracted so largely was heard before the House of Lords in 1843. Lords BROUGHAM, CAMPBELL, COTTENHAM and WYNFORD expressed gratification at the answers given by the judges. LYNDHURST, then lord chancellor, presiding over that august court, said: "I agree that we owe our thanks to the judges, for the attention and learning with which they have answered the questions now put to them." The law of England on this very delicate question, had been declared, in a very decided majority of important cases, substantially as announced by Mr. Justice MAULE; though in some of the earlier cases a severer rule and measure of proof were exacted where insanity was relied on as a defense. See the authorities collected and collated in 1 Russ. on Crimes, 9 to 14.

The case of *Hadfield*, a very celebrated trial for attempting to take the life of the king, seems to have been made somewhat an exception to the rule. This is the case in which Lord ERSKINE made his celebrated argument. We cannot find the report of it

in our library ; but in 1 Russ. on Crimes, 12, will be found a summary of the evidence, and the ruling of Lord KENYON on the main question. The prisoner had been severely wounded in battle, and there was strong evidence that both before and after the assault, he had insane delusions of very pronounced character. The attempt was made in the theater. It was proved that the prisoner "sat in his place in the theater, nearly three-quarters of an hour before the king entered ; that at the moment when the audience rose, on his majesty's entering his box, he got up above the rest, and presented a pistol loaded with slugs, fired it at the king's person, and then let it drop ; and when he fired, his situation appeared favorable for taking aim, for he was standing upon the second seat from the orchestra in the pit, and he took a deliberate aim by looking down the barrel, as a man usually does when taking aim. On his apprehension, among other expressions, he said, that he knew perfectly well that his life was forfeited ; that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer, he supposed. These words he spoke calmly, and without any apparent derangement ; and with equal calmness repeated that he was tired of life, and said that his plan was to get rid of it by other means ; he did not intend any thing against the life of the king ; he knew the attempt only would answer his purpose." These facts showed not only that he knew right from wrong ; not only that he knew he was committing a crime against the law, by which he would forfeit his life, but it exhibited deliberation, and the exercise of the reasoning faculty. Lord KENYON held, that "as the prisoner was deranged immediately before the offense was committed, it was improbable that he had recovered his senses in the interim ; and although, were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed, yet there being no reason for believing him to have been at that period a rational and accountable being, he ought to be acquitted." He was acquitted.

This celebrated case suggests several reflections, by which we may be profited in the administration of the law. The first is, that the workings of a diseased mind are so variant, that it is difficult to lay down an absolute rule for the government of all cases. Each case must depend, more or less, on its own particular facts. And such is the language of the adjudged cases. In the next place, the charge to the jury should be so shaped as to apply, as far as the

law will allow, to the facts of the case on trial. Third, that calmness, indifference to results, consciousness of the moral or legal criminality of the act, with connectedness in the employment of the reasoning faculty, while not conclusive evidence of sufficient sanity to justify criminal punishment, are nevertheless strong circumstances tending to prove legal accountability.

In *Hadfield's* case, we infer from the language of the court, that he would have been adjudged sane and accountable, if it had not been shown that a very short time preceding the attempt on the king's life, he had shown unmistakable symptoms of insanity. So that his case can scarcely be classed as an exception to the rule, which requires the insanity which excuses to be proven to have existed at the very time the act complained of was committed. The cool, calm, indifferent conduct of the prisoner, his consciousness of right and wrong, were, neither nor all of them, evidences which Lord KENYON regarded as proving insanity. He treated them as *indicia* of sanity, to be overcome. The recent, clearly proved insanity of the prisoner caused him to believe that in that case reason had not reasserted her dominion. From it he inferred the continued presence of insane delusion, when the causeless and seemingly unaccountable attempt was made on the life of the king. So, to justify the inference of insanity from the calmness of manner and indifference to consequences which sometimes mark the conduct of the man-slayer, there should be convincing evidence of previous insanity or insane delusions, so recent as, coupled with the causelessness of the killing, to raise the presumption that the paroxysm had not entirely passed away.

The doctrine in regard to partial insanity, asserted by the English judges in *McNaghten's* case, was affirmed in a very able opinion by Chief Justice SHAW, in *Commonwealth v. Rogers*, 7 Metc. 500. And the same principle is asserted by Wharton in his work on Homicide, § 566, citing many authorities in support of it; and in 2 Greenl. Ev., § 372. See, also, *Flanagan v. People*, 52 N. Y. 467; a. c., 11 Am. Rep. 731; *Spann v. State*, 47 Ga. 553; *People v. McDonell*, 47 Cal. 134; *Blackburn v. State*, 23 Ohio St. 146.

There is a species of mental disorder, a good deal discussed in modern treatises, sometimes called "irresistible impulse," "moral insanity," and perhaps by some other names. If by these terms it is meant to affirm that a morbid state of the affections or passions, or an unsettling of the moral system, the mental faculties remaining

meanwhile in a normal, sound condition, excuses acts otherwise criminal, we are not inclined to assent to the proposition. The senses and mental powers remaining unimpaired, that which is sometimes called "moral" or "emotional insanity," savors too much of a seared conscience or atrocious wickedness, to be entertained as a legal defense. GIBSON, C. J., in *Commonwealth v. Mosler*, 4 Barr, 264, while recognizing the existence of moral or homicidal insanity, as "consisting of an irresistible inclination to kill, or to commit some other particular offense," adds: "There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion, which, while its results are clearly perceived, is incapable of resistance." With all respect for the great jurist who uttered this language, we submit if this is not almost, or quite, the synonym of that highest evidence of murderous intent known to the common law; a heart totally depraved, and fatally bent on mischief. Well might he add: "The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least, to have evinced itself in more than a single instance. The frequency of this constitutional malady is fortunately small; and it is better to confine it within the strictest limits. If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order, as well as personal safety. To establish it as a justification in any particular case, it is necessary to show by clear proof, either its contemporaneous existence evinced by present circumstances, or the existence of a habitual tendency developed in previous cases, becoming in itself a second nature." What is meant by "evinced itself in more than a single instance," and how this principle would work in administration, we are left to speculation. Can that be a sound legal principle, whose 'general recognition would destroy social order, as well as personal safety'? We concur with Mr. Wharton (Hom., § 574), that moral insanity, which consists of irresistible impulse, co-existing with mental sanity, "has no support either in psychology or law."

On the question of the duty and measure of proof on questions of insanity, as a defense in a criminal trial, some rulings have been made in this court. In *State v. Marler*, 2 Ala. 43 (a case of murder), the Circuit Court had charged the jury, "if the facts necessary to constitute the crime of murder have been established by the proof,

that it devolved upon the prisoner to prove his insanity at the time of the commission of the act ; and if the jury, from the evidence, entertained a reasonable doubt of the prisoner's insanity at the time of the commission of the act, and believed also that it would be murder in him, it would be their duty to find him guilty of murder."

The court had been requested to instruct the jury, that a reasonable doubt of the sanity of the prisoner required his acquittal. This court (ORMOND, J.) quoted from the language of MANSFIELD, C. J., in *Bellingham's* case, as follows: "That in order to support such a defense, it ought to be proved by the most distinct and unquestionable evidence, that the prisoner was incapable of judging between right and wrong ; that in fact it must be proved beyond all doubt, that at the time he committed the act, he did not consider that murder was a crime against the laws of God and nature ; and that there was no other proof of insanity, which would excuse murder or any other crime." Judge ORMOND added : "These opinions, which are undoubted law, show the stringent nature of the evidence, by which insanity must be proved, to be an excuse for crime ; but we do not understand that even this defense must be established by evidence so conclusive in its nature, as to exclude every other hypothesis. This would be requiring something akin to mathematical proof, of which the subject is clearly not susceptible ; but the jury must be fully satisfied that the defense is made out, beyond the reasonable doubt of a well-ordered mind. To test the case at bar by these principles, the court was moved to charge the jury, 'that if they entertained any reasonable doubt as to the sanity of the prisoner, they must acquit him' ; which charge the court refused. Upon the principles here laid down, it was error to refuse this charge. * * * It would have been highly proper that the court, when called on thus to charge, should have explained to the jury that this defense was required to be made out by strong, clear and convincing proof ; and guided by these considerations, if they still entertain a reasonable doubt of the sanity of the prisoner, it was their duty to acquit."

We confess ourselves unable to reconcile the two propositions of this charge. Under the one the defense of insanity is required to be made out by strong, clear and convincing proof ; under the other the evidence is sufficient if it generates a reasonable doubt. If reasonable doubt of the existence of a fact is equivalent to strong, clear and convincing proof of its existence, then the charge can be

reconciled and understood. With every respect for the able jurist by whom this opinion was delivered, we fear its tendency would be to confuse and mislead the jury. COLLIER, C. J., dissented, saying: "A reasonable doubt whether the accused was sane would not authorize his acquittal. There must be a preponderance of proof to show insanity to authorize a verdict of not guilty for that cause."

In the case of *State v. Brinyea*, 5 Ala. 241, the same judges presiding, on the question of insanity as a defense, the Circuit Court had charged the jury that "the prisoner was bound to make out by testimony, beyond all reasonable doubt, that he was insane at the time the act was committed, by proof clear, strong and convincing; and if upon the testimony the jury should entertain no reasonable doubt of the defendant's sanity, they should find him guilty." It will be observed that in this case the rule laid down by the Circuit Court as to the measure of proof of insanity required of the prisoner was that it should be shown beyond all reasonable doubt, and to this the court added: "If the jury entertained no reasonable doubt of the prisoner's sanity they should find him guilty." This court in commenting on this charge, said: "The objection to the charge cannot avail the prisoner, as it is in strict accordance with the rule declared in *Marler's case*. * * * The prisoner then was bound to make out by testimony beyond all reasonable doubt that he was insane at the time the act was committed, by proof strong, clear and convincing. * * * The charge, it is true, is in the negative — that if the jury had no reasonable doubt of the sanity of the prisoner he should be convicted. This, as it seems to us, is precisely equivalent to a charge that if a reasonable doubt of his sanity was entertained the jury should acquit." This charge, then, as construed by this court, and its correctness affirmed, reasserts the two propositions which we have said above we cannot reconcile. It goes even further, and affirms that insanity as a defense must be proved beyond a reasonable doubt, and then adds, if the testimony generates a doubt of its existence this is sufficient. Rules of law ought not to be so declared as to leave the mind bewildered in their attempted solution. Instructions to juries should be clear and freed from ambiguity.

In *McAllister v. State*, 17 Ala. 434, this court, DARGAN, C. J., delivering the opinion, said: "When the plea of insanity is interposed to protect one from the legal consequences of an act which

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amounts to a crime, to render the defense available the evidence must be such as to convince the minds of the jury that at the time the act was done the accused was not conscious that in doing the particular act he was committing a crime against the laws of God and his country. If he knew right from wrong and knew that he was violating the law, he is then guilty, for it is this conscious knowledge, connected with the act, that constitutes the crime." We feel at liberty to affirm that the question of the measure of proof on the defense of insanity is not settled in this court.

Much has been written, and there is much hypercriticism in the discussion of the propositions that in criminal prosecutions the *onus* is never shifted, and that the presumption of innocence accompanies the prisoner through all the stages of his trial. These are valuable canons of the law, but like most other general rules are subject to some modifications in their application, the observance of which is essential to the good order and well-being of society. Murder at common law is made up of two ingredients, the act and the intent. All men are presumed to intend the natural result of their voluntary acts. The voluntary employment of a deadly weapon, lying in wait, the administration of poison, each supplies the presumption which unexplained is proof of the intent or malice aforethought which stamps the homicide as murder. Proof of the killing and the manner of it accomplishes the purpose of establishing the *factum* or act, and the felonious intent or formed design with which it is done, unless in the testimony which proves the act, or in some other proof, the offense is extenuated or excused. The common-law definition of murder declares that the malice which characterizes its bad eminence may be implied as well as expressed. So one found in possession of goods proven to have been recently stolen is presumed to be the thief until explanation of his possession is given. Many statutes which create offenses out of certain acts, unless certain conditions exist, cast on the accused the duty of excusing himself by proof of the required conditions. In this class are the offenses of carrying deadly weapons concealed about the person and retailing spirituous liquors without license. So then there are cases in the law where one material element of a crime is inferred from the proof which establishes the other, if there be before the jury only the testimony which establishes that other fact. We imagine, also, there is a distinction and a difference between the constituent facts which make up a given crime

— murder, for example — and which facts are common to every case within the class, and those occasional, or exceptional questions of fact, which do not necessarily belong to the class, but may be termed the accidents of the case. That a reasonable creature in being was killed ; that the prisoner on trial was the agent or manslayer, and that he did the act with malice aforethought, express or implied, are facts necessary to be shown in every successful prosecution for murder. To this extent, and to each of these constituent, indispensable elements, the burden rests with the State to prove their existence, beyond a reasonable doubt. The presumption of innocence, in which all men are primarily panoplied, follows, and guards them through all the stages of the trial, until these uniformly constituent facts are established. The law, in its firm yet conservative morality, declares that all men, who have attained to years of discretion, are presumed to be of sound mind ; and without any proof of that fact, resting securely in the presumption of sanity, it adjudges the offender shall suffer its penalties. But there are persons of mature years, whose minds are so diseased, as that they are incapable of discriminating between right and wrong; and this defense is set up in avoidance of the facts which otherwise stamp the prisoner as a murderer. We here enter the field of the exceptional, the accidental ; and inasmuch as the law presumes sanity, that presumption, like that of innocence, should prevail throughout the trial, until it is overcome. And whether the evidence of insanity arise out of the testimony which proves the homicide, or is shown *aliunde*, reason and analogy alike declare it is insufficient, until it overturns the presumption of sanity.

In *Commonwealth v. Eddy*, 7 Gray, 583, the court said : “The burden is on the Commonwealth to prove all that is necessary to constitute the crime of murder. And as that crime can be committed only by a reasonable being — a person of sane mind — the burden is on the Commonwealth to prove that the defendant was of sane mind when he committed the act of killing. But it is a presumption of law that all men are of sane mind; and that presumption sustains the burden of proof, unless it is rebutted and overcome by satisfactory evidence to the contrary. In order to overcome this presumption of law, and shield the defendant from legal responsibility, the burden is on him to prove to the satisfaction of the jury, by a preponderance of the whole evidence in the case, that at the time of committing the homicide he was not of sane mind.”

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Pennsylvania stands unmistakably committed to the same doctrine. *Ortwein v. Commonwealth*, 76 Penn. St. 414 ; s. c., 28 Am. Rep. 420. The opinion is both able and philosophic. Says AGNEW, C. J. : "Insanity is a defense. It presupposes the proof of the facts which constitute a legal crime, and is set up in avoidance of punishment. Keeping in mind, then, that an act of willful and malicious killing has been proved, and requires a verdict of murder, the prisoner, as a defense, avers that he was of unsound mind at the time of the killing, and incapable of controlling his will ; and therefore that he is not legally responsible for his act. * *

* Soundness of mind is the natural and normal condition of men, and is necessarily presumed ; not only because the fact is generally so, but because a contrary presumption would be fatal to the interests of society. No one can justly claim irresponsibility for his act contrary to the known nature of the race of which he is one. He must be treated and be adjudged to be a reasonable being, until a fact so abnormal as a want of reason positively appears. It is therefore not unjust to him, that he should be so conclusively presumed to be, until the contrary is made to appear on his behalf. To be made so to appear to the tribunal determining the fact, the evidence of it must be satisfactory, and not merely doubtful, as nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature." To the same effect are *State v. Smith*, 53 Mo. 267 ; *People v. McDonnell*, 47 Cal. 134 ; *State v. Lawrence*, 57 Me. 574 ; *Leoffner v. State*, 10 Ohio St. 599 ; *State v. Starling*, 6 Jones (N. C.), 366 ; *State v. Feller*, 32 Iowa, 50 ; *McKenzie v. State*, 26 Ark. 332 ; Whart. on Hom., § 665 ; 2 Greenl. Ev., § 373. Mr. Wharton, in his work on Homicide, § 666, classes New York among the States that hold insanity is a defense, the affirmative proof of which rests with the defendant. The question, we think, is somewhat unsettled there. *Flanagan v. People*, 52 N. Y. 467 ; s. c., 11 Am. Rep. 731.

There are respectable authorities to the contrary, but we decline to follow them. We hold, then, that insanity is a defense which must be proven to the satisfaction of the jury, by that measure of proof which is required in civil causes ; and a reasonable doubt of sanity, raised by all the evidence, does not authorize an acquittal. The doctrine we have been combating is, we think, purely American ; and we regard it as an erroneous application of the principle

of presumed innocence. One disputable presumption should not be allowed to override and annihilate another.

Under the rules above declared, the entire affirmative charge of the Circuit Court is free from error. Of the charges asked by defendant, those numbered 1, 2 and 3 were abstract, there being no evidence to support them; those numbered 4, 5, 6, 10, 11, 12, 13, were all rightly refused, under the principles we have declared above; charges 6, 7 and 8 were calculated to mislead the jury, if they were not abstract, and were rightly refused; the two charges given at the instance of the prosecution are free from error; and the judgment of the Circuit Court must be affirmed.

It is therefore ordered and adjudged that on Friday the eleventh day of June, 1880, the sheriff of Talladega county execute the sentence of the law, by hanging the said George Boswell by the neck until he is dead.

Judgment affirmed.

BRICKELL, C. J., dissenting.

NOTE BY THE REPORTER. — See *contra*, *Quetig v. State*, 66 Ind. 94; s. c., 32 Am. Rep. 99. In *Webb v. State*, 9 Tex. Ct. App. 490, the same doctrine was announced as in the principal case, HUNT, J., dissenting. The court said:

"The most formidable question in the case under consideration grows out of the refusal of the court to give in charge to the jury a special instruction requested, as follows: 'That if the jury entertain a reasonable doubt of the sanity of the accused at the time he shot Charles Foster, they should acquit him.' Upon the issue of sanity and insanity the general charge given followed almost literally the law as enunciated in *Webb v. State*, 5 Tex. Ct. App. 506, and which was but a reproduction of the doctrine upon that subject as declared in 2 Greenl. on Ev., §§ 372, 373. After making an appropriate application of these rules of law to the facts, the jury were further charged: 'It is your province to determine from all the evidence in the case whether the defendant was sane or insane. Every defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence, beyond any reasonable doubt, and in case of a reasonable doubt as to his guilt he is entitled to be acquitted. Therefore, if you have any reasonable doubt of the guilt of the defendant, under the evidence in the case and the law as herein given you, you will acquit him.' Here it will be seen that the court had charged the reasonable doubt fully with regard to the whole case made by the evidence. Was the defendant entitled to, and was it incumbent upon the court to further charge, in addition, the reasonable doubt specially with regard to the issue of his sanity?"

"In this State this question has never heretofore, so far as we are aware, been directly adjudicated. If we look to the English decisions, or the decisions of the other State courts, we find much contrariety of opinion upon the subject, some courts holding that the burden of proving his insanity rests upon the defendant who interposes it, and that he is in duty bound to establish it as an independent fact, beyond all reasonable doubt; others hold that the fact must be established by defendant, but need only be shown by a preponderance of evidence, as in civil cases, sufficient to overcome the presumption of sanity, and not necessarily to the exclusion of the reasonable doubt; whilst others again — and these may be classed as of the modern or progressive school — insist that inasmuch as the burden of proof never shifts from the State in any criminal case, but rests upon her to establish every element necessary to constitute the crime alleged, and inasmuch as the question of a defendant's sanity enters into and tends to controvert the most important constituent of

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crime,—to wit, the criminal intent,—that therefore the State must affirmatively establish the fact of sanity beyond a reasonable doubt. Those curious to investigate these different theories, and the grounds upon which they rest, will find the authorities collated and discussed in *Boyard v. State*, and the editor's notes to the case (1 Morris Cr. Cas. 818), and in 2 Bish. Crim. Proc. (3d ed.), §§ 669 to 673, inclusive. Whart. Cr. Ev. (8th ed.), § 335 *et seq.*

"Our own State, in the plenitude of her mercy and humanity, following the generous dictates of all human and divine law, declares that 'no act done in a state of insanity can be punished as an offense' (Penal Code, art. 39), and in the definition of murder provides that it must be the act of one 'of sound memory and discretion.' These two principles are, however, subordinate to another, which is a postulate in estimating all human action from a legal stand-point, and that is that every man is presumed to be sane until the contrary is made to appear. This presumption of sanity is one of the maxims of the law. To such an extent is it indulged, even in cases of murder, that 'the indictment makes no mention that the accused is of sound mind, even when drawn on a statute which has the words 'of sound memory and discretion.' For though sanity is essential to crime, it is sufficiently charged in the allegation of the criminal act, being the *prima facie* condition of mankind.' 3 Bish. Cr. Proc. (3d ed.), § 669. And so also 'the authorities agree, and properly, that in some way the presumption of sanity attends the proven acts of the prisoner, operating with sufficient force to create against him a *prima facie* case.' *Id.*, § 673. Such a case is more than *prima facie*; it is a positive case.

"To us it appears needless to dispute as to how or in what manner this presumption is to be rebutted and overcome. It is self-evident that if no issue at all of sanity is raised by the evidence introduced by the State, nor by that produced in behalf of the defendant, then the positive case (*prima facie*, as it is called by Mr. Bishop) established by the State should and will rightfully carry conviction with it by virtue of the presumption. But if, beyond this presumption of sanity,—if beyond the positive, not alone *prima facie*, case attending the proven acts constituting the crime,—it still devolves upon the State to show affirmatively the existence of sanity beyond a reasonable doubt, then it seems to us that it necessarily follows that this proof must be made in all cases, irrespective of whether the issue grows out of the evidence or not, and consequently that the virtue of the presumption becomes a delusion, and a *prima facie* case without this proof an utter impossibility. The folly of such an argument is its own most appropriate answer.

"Suppose, however, that the sanity of the defendant does become a question,—whether from the evidence of the State or that adduced by the defendant,—should the State show the sanity or the defendant the insanity beyond a reasonable doubt? Admit, for the sake of the argument, that the duty devolves upon the State; how is the judge to charge fully the law applicable to the subject? In terse, plain, and comprehensive terms he could not, perhaps, better express it than in the following language, viz.: "The law presumes every man to be sane until his sanity is established beyond a reasonable doubt." This, it may be said, is an absurdity. Grant it, and yet the absurdity will rest where it properly belongs, with those maintaining the proposition that the State shall prove sanity beyond a reasonable doubt.

"We do not deem it necessary or incumbent upon us to unravel or attempt to answer the misty mazes and the metaphysical disquisitions indulged in by the opposing theorists about sanity being essential to criminal intent, and criminal intent being essential to punishable crime, nor their equally abstruse and obscure views as to which side has the burden of proof when the sanity of the defendant, from whatever cause, acquires a *status* in the case. The attempt would be as useless as profitless, in our view of the question. We are free to admit that the defendant is not bound to plead his insanity specially, nor that he may not show it under 'a plea of not guilty.' Still, this does not settle it that the burden of proof is either on the State or the defendant. Until the legislature definitely declares a rule, the question will still, perhaps, remain in doubt as to where the burden of proof rests. We think it is unnecessary that we should determine it. Oftentimes it occurs in law, as in ordinary human transactions, that between opposing theories and opinions there is a middle ground, which, once attained, will lead to safe and satisfactory results. '*In medio tutissimus ibis.*' And so, in our opinion, in regard to this question of sanity in criminal cases. Mr. Bishop states this middle ground. He says: 'The doctrine of principle, sustained by a large part of our courts and rapidly becoming general, is that as the

pleadings inform us, insanity is not an issue by itself, to be passed on separately from the other issues, but like any other matter in rebuttal, it is involved in the plea of not guilty, upon which the burden of proof is on the prosecuting power; the jury to convict or not according as, on the whole showing, they are satisfied or not, beyond a reasonable doubt, of the defendant's guilt.' 2 Bish. Cr. Proc., § 673. And Mr. Wharton says: 'At the same time, if the defense goes to negative malice, and malice is an essential part of the case of the prosecution, then, if on the whole evidence there be a reasonable doubt as to malice, there should be an acquittal. Whart. Cr. Ev., § 335.

"It is a noticeable fact that those who insist that the doctrine of reasonable doubt applies to the question of sanity, because insanity is an attack upon the integrity of the criminal intent which the State is always bound to show affirmatively, are also forced into the position that it is not a distinct substantive issue upon which the defendant has the burden of proof. In other words, they claim that it is a part and parcel of the whole case made by the State; one which she is bound to establish beyond a reasonable doubt, and one which, when she has established it on the whole case beyond a reasonable doubt, is not sufficient, because she has not established it beyond a reasonable doubt when applied to the question of sanity separately and alone. The inconsistency is in giving to a part a prominence sufficient to defeat the whole of which it is but a part, and in insisting that a part shall control the whole, instead of being only considered with and included in it. It will not do to say that the reasonable doubt, independent of the whole case, applies and must be given to each and every element going to make up the *corpus* of the crime, and failing to do so, that the charge would be insufficient; because such a rule would lead to unnecessary and perhaps interminable confusion, and in a case of circumstantial evidence, for instance, it would be necessary to charge it with reference to each isolated fact in a chain of facts essential to the existence of the main fact. No one, we suppose, will contend that this is requisite. Speaking of the defense of an *alibi*, in the case of *Walker v. State*, Chief Justice ROBERTS says: 'It is not a defense at all, in any other sense than as rebutting evidence tending to disprove the fact alleged in the indictment, that Walker killed Butler, the burden of proving which allegation rests on the State throughout the whole trial.' And again: 'The rule of law is that such evidence of an *alibi* should only be of such weight as to produce upon the minds of the jury a reasonable doubt of the fact affirmed by the State, that Walker was the man who shot Butler.' 42 Tex. 300. In the case at bar, the evidence of insanity was no defense, save as it tended to rebut or destroy the criminal intent with which Webb shot and killed Foster, and it should only be given such weight as would produce upon the minds of the jury a reasonable doubt, not of Webb's sanity, but of the fact affirmed by the State, which was that Webb killed Foster with criminal intent, and under circumstances constituting the crime murder."

HUNT, J., dissenting, referred to his opinion in *King v. State*, 7 Tex. Ct. App. 515. He there said: "When the plea of insanity is interposed, is the burden of proof on the State to show sanity, or is it on the defendant to prove insanity? Brush from this question the dust of ancient days, separate it from its old companions, and its solution is perfectly simple. Before entering upon an analysis of this subject permit us to allude to some very strange and inconsistent expressions used by the learned judges in treating of this question. The following are of the number alluded to: 'As insanity excuses the commission of crime, on the ground that the actor is not a responsible being,' etc. 'The onus of proving the defense of insanity, or, in the case of lunacy, of showing that the offense was committed when the prisoner was in a state of lunacy, lies upon the prisoner. 'It is rather in the nature of a plea to the jurisdiction, or a motion to change the venue. The defendant, through his counsel and friends, comes in and says that he is not amenable to penal jurisdiction.' A very respectable volume could be made of such remarks, but those cited will suffice for our purpose.

"Let us take a steady look for a moment at these propositions. For example, take the first. What sane mind can comprehend the possibility of a crime being committed by an insane person? If the prisoner is insane there is no crime. If there be crime there is no insanity. Insanity cannot excuse crime, from the fact that if insane there is no crime to be excused. These observations apply to the second. Now to the third: 'Plea in the nature of a plea to the jurisdiction.' This plea never draws in issue the guilt of the prisoner. Under this plea sanity or insanity would be the issue separate and independent

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from the question of guilt to be determined. But the court has jurisdiction of the crime if any has been committed; and how are we to sever the one from the other? Shall we first try the question of sanity and then that of guilt? Not so, for on the threshold we are met with the fact that under the plea of not guilty evidence on the question of sanity can be introduced. Behold what darkness and confusion surround the question of sanity! a subject around which gather more vagaries and inconsistencies than infest any other question in the whole range of criminal jurisprudence.

"But what shall be said upon the proposition that the plea is 'in the nature of a motion to change the venue?' If there is the faintest, the most remote analogy existing between the plea and a motion to change the venue of a case, we frankly confess our inability to trace it. We had thought the object of a motion to change the venue was to remove a case from the county in which the indictment was found to some other one for trial, and that the ground of removal was based upon the fact that an impartial trial could not be had in the proper county—that in which the indictment was found. To what court or county shall it be taken? Will not the same reasons for the change be found in the court or county to which it is transferred? Most unquestionably they will. These conclusions being true, the case could only find a court of last resort in the tribunal of heaven. This would defeat the ends of human justice, since the primal idea upon which it is based carries with it the further idea of human expiation for human wrong.

"These strange and inconsistent expressions which we find in the writings of eminent text-authors are the legitimate offspring of fundamental error which underlies their treatment of this entire subject, and we merely allude to them here to intensify and concentrate attention upon this parent error, from whose fruitful loins have sprung all of these ill-considered statements upon this question of sanity. In jurisprudence nothing can be more valuable than terse statements of principle. On the other hand, hastily conceived and unhappily worded enunciations not infrequently open the flood-gates of litigation, with its vast attendant expense, and lead to judicial murder under all the forms and solemnities of the law.

"The fallacy of this fundamental error can be made more fully to appear by comparing two propositions:

"1. *Sanity is an inherent, intrinsic element of crime.*

"2. *Sanity is not an inherent and intrinsic element, but is extrinsic and independent of the crime.*

"The last proposition contains a monstrous fallacy, the fruits of which are visible in so many of the text-books, and which are followed out in many of the enunciations in the adjudicated cases. If *sanity* is an *inherent* element of crime, no well-ordered mind can stop short of the conclusion that the State must carry its burden and prove it. Feeling the force of this, writers have treated it as an *extrinsic* matter, separate and distinct from the question of guilt, and hence those strange and incomprehensible expressions above referred to.

"Let us pay our respects to this last proposition, and see if from a bare touch it will not crumble to dust. '*Sanity is extrinsic.*' Therefore the prisoner is to be tried for the act, and the question of *intent* or *malice* is not drawn in issue. This for the simple reason that an issue formed upon the question of *intent* or *malice* irresistibly includes that of *sanity*; for there can be no *intent* or *malice* without *sanity*. Therefore it follows from this erroneous position that the jury, in viewing the act sought to be punished, must strip it of the intent which prompted it, and look alone to the act. To this we enter our solemn protest.

"We now invite attention to what we believe to be the true position, which is that *sanity is an inherent, intrinsic, and necessary element of crime.* Is this a correct proposition? Is it not a self-evident proposition? If murder can be committed without *intent* or *malice*, then the proposition is false; if not, it is true. But we do know, if it be possible to know any thing, that, to constitute murder, the act of killing must be attended not only with the intent to kill, but with *malice*; and we also know, with the same degree of certainty, that there can be no *intent* or *malice* without *sanity*. It therefore follows, beyond any shadow of doubt, that *sanity* is an inherent, intrinsic, and necessary ingredient of crime.

"We now return to the first proposition stated at the beginning of this opinion, which is as follows: 'When the plea of insanity is interposed, is the burden of proof on the State to show *sanity*, or is it on the defendant to prove *insanity*?' We have thus stated the propo-

sition because we find it so stated in the books, but it is not a practical one. There is no such plea known to our Code as applicable to a trial of a criminal cause. We have four pleas—two special, and the pleas of 'guilty' and 'not guilty'—and this plea of 'not guilty' is a denial of every material allegation in the indictment. Under it, evidence to establish the insanity of the defendant, and every fact whatever tending to acquit him, may be introduced. It follows that under this plea the defendant denies every constituent element of the offense charged, and this plea of 'not guilty' is the same as if the defendant had denied specifically each element of the crime charged.

"This leads us to the consideration of the charge in this case, which is murder, and is defined thus: 'Every person with a sound memory and discretion who shall unlawfully kill any reasonable creature in being, within this State, with malice aforethought, either express or implied, shall be deemed guilty of murder.' From this definition it follows that, to constitute this offense, the slayer must be 'of sound memory and discretion'; a 'reasonable creature' must be slain, and the slayer must be actuated by 'malice.' We have then, first, 'sound memory' in the slayer; second, a 'reasonable creature' slain; and the slayer prompted by 'malice.' These constitute murder, and nothing less than all of these can constitute murder. By what principle of logic, reason, or justice can either of these elements be eliminated from the offense? From this it follows that an indictment charging this offense embraces all the above elements, whether specifically named or not; and though the indictment omits to charge that the defendant was of 'sound memory,' yet charging 'malice,' *sanity* is necessarily included. The problem which equals murder is composed of three members: First, 'sound memory' of slayer; second, 'reasonable creature' slain; and third, 'malice' in the slayer.

"Let us see if we can eliminate from this problem one of these members, and leave every element of the offense in the problem. There can be no 'malice' without *sanity*, hence 'malice' includes *sanity*. We therefore have, first, a 'reasonable creature' slain; second, a malicious slayer—murder. Hence the charge in the indictment, that the killing was with 'malice aforethought,' charges the slayer to be of 'sound memory and discretion.' If this conclusion is not correct, we most unhesitatingly assert that the indictment is worthless; for we have found, under our Code, *sanity* to be an element of murder, and, by well-settled rules of criminal pleading, an indictment which fails to embrace in its allegations all of the constituent elements of the offense is fatally defective. The authorities approach nearer to unanimity upon this question than any other known to us.

"If the above analysis be correct, and we think it is, it devolves upon the State to prove every *inherent* element of the offense; and as we have found *sanity* to be such an element, it rests upon the State to prove *sanity*. Still holding with a firm grasp the proposition that *sanity* is an *inherent* element of the offense, and as there is no such thing in law as separating the *elements* of an offense so as to cast the burden of a part upon the State, and, *as to the rest*, to require the defendant to take the burden of proving a negative, it follows that the existence of each *element* is an *affirmative* proposition, the proof of which rests with the State. The idea that the burden of proof shifts is in direct conflict with the philosophy of criminal jurisprudence, and at war with fundamental principles; for we hold that, with regard to necessary ingredients, it never shifts. If two or more elements constitute an offense, which of these elements must be proven by the State, and which must be proven *not* to exist by the defendant? If *elements*, do they not all stand upon the same plane, or are there some which prove themselves? If there are, they are not *elements*. Are we to require the defendant to prove the non-existence of that element—*sanity*—upon which intent and malice depend, and yet hold the State to prove *intent* and *malice*? To us it is impossible to harmonize, logically, these positions.

"We are now led to meet the most plausible, difficult, and potent position which can be assumed upon the other side. And we here concede that it is supported by the weight of authority; but we do not think it is founded in principle, and if not founded in principle, to follow would be dangerous. It is this: The fact of killing being admitted, and that beyond doubt the prisoner did the killing, and *sanity* being the normal condition of all persons, the law presumes the prisoner sane until he shows to the contrary; and therefore the burden of proving *insanity* rests with the prisoner. It will be seen at once that the struggle is with this presumption of *sanity*.

"Let us move quietly but closely up to this gentleman, and try to see who he is. The

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name of this witness is *presumption*. He is a venerable gentleman. He was contemporary with the first-born principles of enlightened jurisprudence. For truth and integrity he has never been excelled by any witness. His means of knowledge are unsurpassed, having for a foundation the laws of nature, and the truth of his evidence is corroborated by the experience of man through all ages. The effect of his evidence is the production of not only a mere *prima facie* case, but full and complete conviction when not opposed. Upon his evidence alone, when not contradicted, sanity being the only issue, man has been made to expiate the violated law with his life. When he speaks to the sanity of the prisoner, his evidence meets with an approving response in the mind of every intelligent and honest juror, for their experience corroborates his testimony. But he is not infallible. He never testifies to the sanity of any *particular individual*. His is never *positive*, but always *presumptive* evidence. Sanity being the normal condition of man, he *presumes* that to be the condition of the prisoner. With the parents or relatives of the prisoner he is not acquainted. He is not aware of the fact that perhaps some of the prisoner's blood-relatives are now inmates of an asylum for the insane. Though his locks are bleached by the winters of ages; though he has never been charged with prejudice, and though his evidence is supported by the laws of nature and corroborated by the experience of man, yet he is somewhat *arbitrary*. He places the prisoner in the normal condition of man, which is *sanity*, and demands of him the same conduct whether sane or insane. He *never heard of insanity*, because he speaks alone from the laws of nature, and *insanity* being an *exception* to the natural rule, they are unacquainted. With the prisoner's language, conduct, or misfortunes he has nothing to do, and of them he is entirely ignorant. Yet he holds him with an iron grasp to the laws of nature and the experience of man. Is he omnipotent? How many witnesses are necessary to measure arms with this Titan? Does he partake of the kingly character, and can he 'do no wrong?' Upon the testimony of one witness alone, the prisoner may be legally convicted and executed. Can this gentleman's evidence accomplish more? In no case can he accomplish more than can be effected by the evidence of one witness. We do not mean the evidence of *any witness*. Can the evidence of one witness ever be an overmatch for him? In some cases it legally and justly can; in others the testimony of scores will not suffice, this depending always upon the character of the witnesses, their means of knowledge, and the *facts sworn to*.

"Having endeavored to become somewhat acquainted with this witness *presumption*, we now desire to call special attention to a very remarkable feature of his character. It is conceded by all that his evidence is relied upon, and is absolutely necessary to convict, in a great many cases in which the *question of sanity* is not involved. It is also conceded, under our decisions, that in *these very cases* the burden of proof *does not shift*, but remains with the State throughout. Now, upon what principle of logic or justice can we give to this *presumption* so much power in a case involving the question of *sanity* as to *shift the burden to the prisoner*, and in the other cases hold that it does *not shift*?

"In *Ake v. State*, 6 Tex. Ct. App. 396; s. c., 33 Am. Rep. 586, Judge WHITE makes an extract from the opinion of Judge BIGLOW in the case of *Commonwealth v. McKee*, 1 Gray, 61. From it we give the following: 'The general rule as to the burden of proof in criminal cases is sufficiently familiar. It requires the government to prove, beyond a reasonable doubt, the offense charged in the indictment, and if the proof fails to establish any of the essential ingredients necessary to constitute the crime, the defendant is entitled to an acquittal. This results not only from the well-established principle that the presumption of innocence is to stand until it is overcome by proof, but also from the *form of the issue* in all criminal cases tried on the merits, which being always a general denial of the crime charged necessarily imposes on the government the burden of showing affirmatively the existence of every material ingredient which the law requires in order to constitute the offense. If the act charged is justifiable or excusable, no criminal act has been committed and the allegations in the indictment are not proved. This makes a broad distinction in the application of the rule as to the burden of proof in civil and criminal cases. In the former matters of justification or excuse must be specifically pleaded in order to be shown in evidence, and the defendant is therefore by the form of his plea obliged to aver an affirmative, and thereby to assume the burden of establishing it by proof, while in the latter all such matters are open under the general issue, and the affirmative—viz., proof of the crime charged—remains in all stages of the case upon the government.'

"The quotation being ended, Judge WHITE proceeds: 'As thus enunciated, we believe the doctrine to be correctly asserted, and we know of no decision of any of the courts in this State which has ever contradicted or contravened it.'

"We ask special attention to the doctrine enunciated by Judge BIGELOW, and which is affirmed by our own judge in the opinion above quoted from, which is as follows: 'The burden of proving every essential element necessary to constitute the offense is with the government, and this remains, in all stages of the case, upon the government.' This rule applies only to the burden of proof of the necessary ingredients of the offense, and as Judge WHITE further and properly states, 'when distinct substantive matter is relied upon by the defendant to exempt him from punishment and absolve him from liability, then that is matter foreign to the issue as made by the State in her charge against him, and the burden of proving it, in reason, common sense and law should be upon the defendant.' The italics are ours.

"From the above we deduce these rules:

"1. The State must prove every necessary ingredient of the offense, and so far as they (the ingredients) are concerned the burden of proof never shifts.

"2. When distinct, extrinsic matter is relied on by the defendant, the burden is on him to prove it to the satisfaction of the jury.

"To these rules we give our hearty assent. But the grand, fundamental question here again presents itself: 'Is sanity a necessary element of crime?' We have said all we desire to say on this question.

"We now propose to return to that plausible position of the other side, 'The evidence showing the act to have been done by the defendant, and sanity being presumed by the law, the burden shifts to the defendant.' Those who occupy the other side plant themselves upon this proposition, and ask with plausibility and a great show of victory, 'Will not the prisoner be convicted if he fail to introduce evidence of his insanity?' We admit that he will, and justly. But suppose the evidence shows that the defendant killed the deceased intentionally, with a deadly weapon, and here closes. Will not the prisoner be convicted if he fail to introduce evidence in excuse or justification? Let us take another case: The State proves by a number of unimpeachable witnesses that the deceased was brutally murdered by some one in the perpetration of rape, and witness after witness has sworn to the identity of the prisoner as being the perpetrator of the foul deed, and in addition to all this the State proves by a number of witnesses facts strongly tending to prove the presence and guilt of the prisoner. If the case closed here, would not the prisoner be in very great danger of losing his life? Can presumption make a stronger case than this? Bear in mind that the above facts constitute the case before the court, and the judge should charge the law applicable to the case as made by the facts. Now suppose, in this case, the State having closed, the prisoner proves, by a number of his neighbors, that he was at another place at the time the offense was committed, and adds fact upon fact in support of their evidence in favor of an alibi. This would be quite a different case from the first, but the case. Now, suppose the judge should split the last case just where the State closed (notwithstanding the case as made by all the evidence), and charge that the burden of proof shifted to the prisoner to prove his alibi. Would that be held sound law in this State? By no means, and for the simple reason that if the prisoner was not there he is not guilty. An alibi strikes at the very heart of the proposition of guilt, and every particle of evidence in its support, though negative in its character is a direct attack upon the theory of his presence at the place of the crime; and, if not there, he is not guilty. And here we would call attention to another source of confusion (in our judgment), which is that many judges fall into the error of viewing the case, not as a whole, but in its different stages, and apply the law in their charges to these stages. This splitting up of a case into several parts, and, by the charge, shifting the burden first upon the one and then upon the other party, is against law and principle. In every criminal prosecution the guilt of the prisoner is the objective point, and every step, every move, every element of the offense and any fact which is necessary to arrive at that point, is affirmative in its very nature; and, as to any of these, the burden never shifts.

"We have found, in this supposed case of murder, that if the defendant failed to introduce evidence he would likely forfeit his life; but we have also found that the burden in that case did not shift. Now, suppose the State proves that the prisoner deliberately, and with

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a deadly weapon, kills the deceased, and here the evidence closes. Must the State go further, and prove sanity, by introducing a witness to that point? By no means, for sanity is not in the case. But suppose the prisoner piles fact upon fact tending to show insanity, must the court charge that the burden in this case is on the prisoner?

"Is this a stronger case than the one above put? We think not. Then, can any sound, logical reason be given for shifting the burden in the last and not in the first case? Most unquestionably not. We have found that proof of an *alibi* is a direct attack upon the theory of the defendant's presence at the place of the crime. Proof of insanity is therefore an attack upon sanity, and if this is gone, there is no intent, no malice; and if these are wanting, there is no murder, no crime. If there is a mistake in these conclusions, we are not capable of reasoning upon any subject, for these are our settled and honest convictions.

"We therefore conclude, that since *sanity* is an *essential, inherent element of murder*, and since the State must prove all of the *necessary ingredients* of the offense charged, we cannot escape the conclusion that the State must prove *sanity*; and as we have found that the burden of proof does not shift in regard to *necessary ingredients* of the offense, and as *sanity* is such an ingredient, it also follows that the burden of proof is upon the State to show *sanity*, and not upon the defendant to prove *insanity*—a negative. This rule has no application to cases in which the question of *sanity* is not raised; nor do the rules applicable to *alibi* in all cases, good faith and mistake in theft, etc., have any application in cases in which the *facts do not call for them*.

"Now, let us see if we can put these principles into active operation; for, unless practical they are valueless. The jury is sworn and the plea of 'not guilty' entered by the prisoner. The charge is murder. The burden is on the State to prove guilt. The State proves the killing by the defendant, with a deadly weapon; the wound was mortal, the act deliberate, and not attended with any circumstances of mitigation, extenuation, or justification. But here we are met with the objection that there is no proof of sanity. Not so; for the State has the evidence of that venerable and impartial witness, the truth of whose statements is corroborated by the laws of nature and the experience of man. He is the first witness in every case, and at the very threshold proclaims the sanity of all persons. He not only proclaims sanity, but, when certain facts are proved, he swears to the existence of malice. Not only so, but, when an injury is inflicted, he testifies to the fact that the party inflicting the injury intended so to do. Take the above case, with the testimony of this witness *presumption* in connection with the other facts, and if the evidence closes there, the defendant would and should be convicted. But, the State having closed, the defendant proves fact after fact tending to show the want of sanity. Shall we try him by the presumption or by the facts on the *question of sanity*, or by both the presumption and the facts? If this witness is infallible; if he cannot err; if his evidence is conclusive on the question of sanity, then we should try him by the *presumption*, which would be no trial at all. But, as he knows nothing of *this case*, and since his evidence is not conclusive, when opposed by other evidence, but very powerful, and conveying evidence of a presumptive character, we should try the defendant by *both*. The trial proceeds; the defendant proves fact after fact tending to show the want of sanity; but there is the evidence of that old, hoary-headed witness, who is without partiality or prejudice; who is not related to either of the parties, and who is incorruptible, proclaiming the sanity of the defendant. The jury draw upon an experience which corroborates the truth of his evidence; but, as he knows nothing of the sanity of this particular prisoner, his evidence being of a presumptive character, and not conclusive, the struggle throughout the trial is between his evidence and that of the defendant. The defendant closes, and the old witness *presumption* appears to be crushed; but in comes the State with the evidence of witness after witness swearing to facts tending to show sanity, thus corroborating this witness *presumption*; and thus the jury try the case by the evidence of this witness *presumption*, in connection with *all* the evidence on the question of sanity, giving to each witness and all the evidence their due and proper weight, just as in other cases in which the question of sanity is not involved. It will be seen therefore, that the evidence of this witness *presumption* is to be taken in connection with all of the other evidence, he being treated as a witness in the case.

"By a careful survey of the above positions it will be perceived that the burden of proof

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is quite a different thing from the means or instruments of proof. We have not time here to elaborate this position. We have now said all we desire to say upon the burden of proof, concluding that it never shifts in regard to the necessary ingredients of the offense.

"The court below charged the jury that the burden of proving insanity was upon the defendant. This we think was error. 17 Mich. 111; 16 N. Y. 58; 2 Metc. 240; 43 N. H. 234; 19 Ind. 170; 1 Gray, 61; 7 Metc. 500; 81 Ill. 335; *State v. Crawford*, 11 Kans. 32; *United States v. McClane*, 7 L. R. (N. S.) 430.

"The next proposition is: 'Must the State prove sanity beyond a reasonable doubt?' If sanity is a necessary ingredient of crime, and if it be necessary to prove the ingredients of crime beyond a reasonable doubt, the conclusion that it (sanity) must be proved beyond a reasonable doubt cannot be resisted. Hence the settlement of the first proposition — viz., that sanity is an inherent, intrinsic, necessary element of crime — conclusively settles the last proposition, if the doubt can be applied to the necessary ingredients. To illustrate: The defense is the want of sanity, or alibi, or good faith, or mistake, or any other matter which will defeat guilt; now, is it proper to specifically apply the doubt to either of these grounds? Take, for example, the fraudulent intent in theft, and assume that the facts of such a character as to make this the only question. Upon this the defendant makes his contest. Would it be wrong for the court to apply the doubt directly to this part? We think not. Then, if the doubt can properly and justly be specifically applied to one ingredient of an offense, why not to others, if they are made prominent by the situation of the case. If the court, by its charge, calls special attention to the defense or defenses urged by defendant, and then applies the doubt to the whole case, we are not to be understood as holding that this would be error. But suppose the defendant asked that the doubt be pointedly and directly applied to his defense or defenses, would it be right or wrong for the court to thus apply it? This brings to the front the right or wrong of the principle.

"Now, it is conceded by all that if there be a doubt of the guilt of the defendant the jury must acquit, and as there can be no guilt without *sanity*, a doubt of *sanity* would therefore be a doubt of guilt. If it be proper to acquit upon doubt of guilt, how can it be wrong to acquit upon a doubt of sanity, upon which guilt necessarily depends? Would an honest and just man convict, if he had a well-founded and reasonable doubt of the prisoner's sanity? We think not. Would justice demand his conviction, or would not reason, humanity, and justice imperatively require his acquittal? Then, if upon a well-founded, reasonable doubt of *sanity*, justice demands his acquittal, is it wrong for the court to so state in its charge? Must justice be put to shame, driven to the rear, and forced to enshrine herself behind some other proposition? Has not the prisoner the right to have her brought to the front, face to face with the jury, and the jury to be made to pass upon her merits? In every trial, justice should be kept in the front rank, and not driven to the rear with the stragglers and camp-followers. We therefore conclude that, when requested by the prisoner the court should charge the jury that if they have a reasonable doubt as to the sanity of the prisoner they should acquit. *Hatch v. State*, 6 Tex. Ct. App. 384; *Robinson v. State*, 5 Id. 519; *Kay v. State*, 40 Tex. 29."

WHITE, P. J., and WINKLER, J., dissented.

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(63 Ala. 365.)

Party-wall — destruction by fire — contribution.

In case a party-wall is destroyed by fire, there is no implied obligation to contribute toward rebuilding it.

BILL to recover contribution for re-erection of a party-wall. The court stated the facts as follows:

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"The complainant alleged in his bill that his testator, Antomarchi, and one Joseph Aaron, were severally the owners of two adjoining lots on Dauphin street, in Mobile, on which were two contiguous brick stores; that the middle line of the partition wall between these stores was the boundary between the two properties; and that this wall 'was a wall common to both, and used as a common wall, and had been for a great number of years' before Aaron bought his lot, which he purchased in April, 1860. The bill further alleged that in December, 1873, after the death of Antomarchi, and while complainant, as his testamentary executor and trustee, was in possession of the lot and store so conveyed to him, both of said stores were accidentally burned down, and the wall between them was destroyed to its foundations, which however remained sound and firm; that complainant, as such executor and trustee, caused a store to be rebuilt on the premises of which he was so in possession, erecting the western wall thereof on the foundations of the former wall, so that one-half of the new wall, as of the old, was on the lot conveyed to Antomarchi, and the other half on that of Aaron, upon and along the east side of the latter; that Aaron did not rebuild upon his lot, but left the same vacant, and sold it, in that condition, to defendant, Russell, in the year 1876; and that Russell thereafter built a store upon it, using in doing so, as the eastern wall and side of said store, the wall so constructed by complainant, and carrying it up higher, as was necessary for the latter edifice he erected. There is no averment of any agreement with either Aaron or Russell in respect of this wall, or that either of them knew complainant was building it when he did so. The bill further alleges, that the cost of the wall built by complainant was \$1,125, which sum he paid therefor, and one-half of which is due to him from said Russell who has refused to pay the same, or any part thereof, although it was demanded of him on the completion of the store he built in December, 1876, and 'is lawfully due * * * according to the usage and practice of lot-owners, * * * constantly and uniformly recognized and abided by in said city in similar cases.'

"The answer insists, and testimony was taken to prove, that the entire wall was built on Aaron's lot, now Russell's. But it is not necessary to examine the case in that direction.

"The chancellor dismissed the bill, on demurrer, because the complainant's remedy, if he had any, was at law; and this decree is now assigned as error."

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Stewart & Pillans, for appellant, cited *Campbell v. Mesier*, 4 Johns. Ch. 334; 6 id. 21; 3 Kent Com. 437 (531); *Brown v. Werner*, 40 Md. 15; 3 Eng. Rep. (Moak's ed.) 294; 7 id. 577.

Boyles & Overall, contra, cited *Sherred v. Cisco*, 4 Sandf. 480; *Cole v. Hughes*, 54 N. Y. 444; s. c., 13 Am. Rep. 611; *Partridge v. Gilbert*, 15 N. Y. 601; s. c., 3 Duer, 185; 49 How. Pr. 522; *Day v. Caton*, 119 Mass. 513; s. c., 20 Am. Rep. 347; *Orman v. Day*, 5 Fla. 385; 3 Washb. on Real Prop. 160; 2 id. 363; *Brown v. Cockerell*, 33 Ala. 45; *Barnes v. Ingalls*, 39 id. 193; *Barlow v. Lambert*, 28 id. 704.

MANNING, J. [After stating the facts as above.] There is no statute in this State on the subject of what are called party-walls. In *Bisquay v. Jeunelot*, 10 Ala. 245, a question was brought before this court similar to the one now raised. Jeunelot built a house on his own land, up to the boundary line, we suppose; and the owner of an adjoining lot then also built a house, using for one side of it the wall of Jeunelot. The latter sued the other in assumpsit, for a just proportion of the cost of the wall, and in the court below obtained a verdict and judgment; but the judgment was here reversed. This court said: "The argument here urged is, that although there is no express contract to pay the proper proportion of the cost of the wall, the law creates a duty to contribute when the wall is used, and from the duty the law will imply a promise to pay. The error of this argument is in the assumption, that the law creates the duty of contribution, when one man, without the consent of the owner, uses his wall in the construction of his own house. Such an act, in the absence of a law authorizing it, would be a trespass, which might entitle the party injured to damages, but could not be the foundation of an action *ex contractu*." And for this very reason, we add, it would afford no foundation for a suit in equity, a court of chancery not being the proper forum, in which to claim damages for injuries caused by torts.

But, the case referred to differs from the one before us, in this: that according to the bill of complaint, Russell used in building his store a wall that so far as he appropriated it, was erected, not on complainant's, but on Russell's own land, excepting one-half of that portion which was built up higher, and which does not enter into this case. The wall was there when he bought the lot. He had a right to suppose that any thing then erected on the lot was

duly paid for by the prior owner; and the wall may have constituted a part of the value which induced him to buy the lot. Indeed, he may have, as was said in *Sherred v. Cisco*, 4 Sandf. 489, "so far as we know, paid for it all that it was worth, including the half wall then standing upon it; and a judgment in this suit, compelling him to pay the plaintiff for the same half, will make him pay for it twice."

The case just cited does not differ substantially from the one we are considering, and was very thoroughly and ably discussed. In it the court said: "By the common law, every owner of land is his own judge of the propriety of building upon it, or leaving it vacant; and when he does build, of the manner and extent of his buildings. In the absence of statutory provisions, he may build with what material he pleases; and he is under no obligation to give to his neighbor any use or advantage of his land, by way of support, drip, or easement of any description. If a stranger dispossesses him, or enter upon his unoccupied property, erect buildings, and make valuable permanent improvements upon it, he is not under the slightest obligation to recompense such stranger for any portion of the expense, on recovering the possession of the land." By the common law, he became absolutely entitled to all such improvements, without paying any thing for them, when they were made without his request or sanction.

In respect of another feature, common to this case and the case just cited, the court in the latter said: "It was argued, that the fact of there having formerly been a partition wall (which we will call a party-wall), gives the right to have it continued for all time to come. To test this argument fairly, we will assume, what is not proved, but may, perhaps, be fairly inferred—that the old wall was built by the mutual agreement, and at the joint expense, of the then proprietors of the two lots. It is not disputed that each proprietor remained the owner in severalty of the ground on which half of the wall rested, and of course each owned in severalty one-half of the wall. Neither party had a right to pull down the wall, without the other's consent; and to that extent, the agreement on which it was erected controlled the exclusive dominion which each would otherwise have had over the half of the wall, as well as over the soil on which it stood. The case of *Campbell v. Mesier*, 4 Johns. Ch. 334; 6 id. 21, it may be said, is an authority that each was bound to keep the wall good on its falling into de-

cay; but that case proceeded upon the footing that each had an equal interest in the party-wall, of the same nature as that of tenants in common; and the fact here is clearly otherwise. The parties being confessedly restrained from destroying the wall without mutual consent, how is it when the wall has been destroyed by the elements? The lands on each side are vacant. The agreement upon which the party-wall was built related to that wall only. There was no agreement to build a second wall, or to build houses a second time, in the event that the original wall, and the houses which it supported, should be destroyed. Neither party, perhaps, thought of such event. If they had, it by no means follows that they would at that time have stipulated for a second joint wall. It might well have occurred to them, that if the buildings were destroyed, one or the other might not wish to rebuild, or that one might desire to erect a very strong warehouse for heavy goods, requiring thick walls, and the other a private dwelling, with a wall only half as thick. * * * It suffices to say, that when two owners of adjoining city lots unite in building two stores with a party-wall, we have no right to infer, from that act, an agreement, binding upon them and their heirs and assigns to the end of time, to erect another like party-wall at their mutual expense, when that one is casually destroyed, and so on as often as the new one shares the same fate." See, also, *Cole v. Hughes*, 54 N. Y. 444; s. c., 13 Am. Rep. 611.

We have extracted so largely from the case of *Sherred v. Cisco*, because that case is almost identical with this, and the questions arising upon it are so clearly and cogently discussed. Similar views, forcibly presented, may be found in *List v. Hornbrook*, 2 W. Va. 340, and in *Orman v. Day*, 5 Fla. 385; and the subject of party-walls is instructively treated at considerable length, and with the citation of numerous authorities, in Washburn on Easements and Servitudes, 454-474.

The case of *Campbell v. Mesier*, 4 Johns. Ch. 334; 8 Am. Dec. 570, on which appellant chiefly relies, is different in its facts and features from the present case, and therefore not an authority in point. See *Partridge v. Gilbert*, 15 N. Y. 601.

[Omitting an immaterial point.]

Let the decree of the chancellor be affirmed.

Decree affirmed.

WHITE'S ADMINISTRATOR V. LIFE ASSOCIATION OF AMERICA.

(68 Ala. 412.)

Surety — discharge by conduct of creditor.

A life-insurance company, holding the note of a deceased policy-holder, for money loaned, and knowing that his estate was insolvent, and that the note was signed by a surety, paid the money due on the policy to his personal representative, to whom it was payable by the terms of the policy, although the latter offered to deduct the amount due on the note, or to receive the note in part payment. *Held*, that the surety was thereby discharged.

BILL to restrain a sale of lands under a mortgage, and to cancel and discharge the mortgage, on the ground that the defendant was only a surety on the mortgage note, and had been discharged. The bill stated in substance that the defendant, Life Association of America, a life insurance company, had taken the mortgage in question to secure a note of \$1,200 for money loaned by it, made by Mike White as principal and Worley White as surety; that afterward the defendant insured Mike White's life for \$10,000, payable to his legal representatives; that Mike White died insolvent, and the defendant, knowing his suretyship and insolvency, paid his administratrix \$7,500 in full discharge; that the administratrix was willing and offered to receive the note in part payment, or deduct it from the amount of the insurance money, but the defendant declined so to apply it, and retained the note. The bill was demurred to, and was dismissed.

D. P. Lewis, for appellant.

Walker & Shelby, contra.

BRICKELL, C. J. The contract of suretyship differs materially from that of a guarantor, bound by a separate, distinct contract from that of the principal, founded usually on another consideration, entitled to notice of the default of the principal, and not chargeable with non-performance until such notice is given. Arising from joining in the making of a promissory note, joint and several in its terms, not negotiable, the consideration moving only to the principal, it was defined in *Evans v. Keeland*, 9 Ala. 46, as

"a contract whereby one person engages to be answerable for the debt, default, or miscarriage of another. It is an obligation accessorial to that of the principal debtor; the debt is due from the principal, and the surety is merely a guarantor for its payment."

The contract of a surety imports, it is said by Judge STORY, entire good faith and confidence between the parties, in regard to the whole transaction. The creditor, being informed of the relation, is bound to the duty of disclosure of all facts and circumstances which are calculated to affect materially the discretion of the surety, or the degree of his responsibility. *Railton v. Matthews*, 10 C. & F. 934; *Hamilton v. Watson*, 12 id. 109; *Owen v. Homan*, 3 Mac. & G. 378; *Pidcock v. Bishop*, 5 Dow. & Ry. 505. The good faith, which must be observed in the making of the contract, must be kept inviolate in all subsequent transactions between the creditor and principal. The proposition is thus stated in a general form: "If a creditor does any act injurious to the surety, or inconsistent with his rights; or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, in all such cases the latter will be discharged." 1 Story's Eq., §§ 324-5.

We have numerous decisions, in which these general principles have been applied, and especially directed to a consideration of acts or omissions of the creditor, subsequent to the making of the contract, which have been relied upon as relieving the surety from liability. Any alteration of the contract, without the consent of the surety, *as to him* extinguishes its obligation. It ceases to be the contract into which he entered; and though the alteration may not work injury to him, he is discharged, because he has not given assent to the new contract, and the original contract, to which assent was given, has been displaced and extinguished. *Coincys v. Booth*, 3 Stew. 14; *Pyke v. Searcy*, 4 Port. 52; *Macay v. Dodge*, 5 Ala. 388. The time of performing the contract, the day of payment, may be extended, by some subsequent arrangement between the creditor and the principal, to which the surety does not consent. If there is such an agreement, the surety is discharged, because the burdens of the contract are enlarged; there is practically a change of the original contract—the creditor places himself in a position in which he cannot, on notice from the surety, proceed to sue on the contract, or respond to the decree of a court of equity, which the surety has a right to obtain, compelling him to sue the principal.

Here, again, the inquiry is not whether practically any injury has resulted to the surety. It is enough that the arrangement has been entered into without his consent; and from all such transactions good faith to the surety compels the creditor to abstain.

Mere gratuitous indulgence of the principal, whether extended at his request or without it, yielded by the creditor from sympathy, from an inclination to favor him, or the result of mere passiveness, will not operate to discharge the surety. There must be an agreement, founded on a valuable consideration; for as we have said, there is practically a change of the original contract—a new contract, into which the surety has not entered. The length of the time of indulgence, or extension, is not material. The creditor cannot, for a day, or an hour, by an agreement to which the surety does not yield assent, tie up his hands, so that the surety would be deprived of the right to proceed instantly against the principal, on the payment of the debt; nor hold him to the agreement made alone with the principal. 2 Brick. Dig. 385, §§ 160–165. The main proposition, on which the chancellor rendered the decree now assailed, and which is now advanced to support it, is affirmed in numerous authorities, and its correctness has not been and cannot be questioned. That proposition may be thus stated: Mere passiveness, or mere delay in suing the principal debtor, or in the prosecution of execution against him after judgment, will not discharge the surety. The duty of active diligence in the prosecution of suits, or of execution against the principal, can be devolved on the creditor by the surety, if he desired, by requesting it. But if he is himself passive—if he does not, by preferring the request, quicken the creditor into activity, there is no room for, or justice in his complaint, of the inaction of the creditor, which his own may have induced.

There are circumstances, however, in which the creditor cannot be inactive, without being unjust, and wanting in good faith to the surety. In all such cases, it must be supposed that he intends to discharge the surety; or if that intention cannot be presumed, his inaction, to which the surety does not assent, operates as a discharge of the latter, in courts of law or of equity. An undisputed equity of the surety is, on payment of the debt, to stand in the place of the creditor, as to all securities which the creditor may hold or acquire, for the payment of the debt; and he is entitled to all the benefit from them, which the creditor could have derived. *Cullum*

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v. *Emanuel*, 1 Ala. 23; *Foster v. Athenæum*, 3 id. 302; *Ohio Life Ins. & Trust Co. v. Ledyard*, 8 id. 866; *Fawcetts v. Kimsey*, 33 id. 261; *Lyon v. Leavitt*, 3 id. 430; *Knighton v. Curry*, MSS. It follows that the creditor is bound to exercise reasonable diligence in the preservation of such securities; and if by his negligence they are lost, or if he should disable himself from surrendering them to the surety, on payment of the debt, the surety is discharged, to the extent to which the securities, if made available, would have extinguished his liability. *Cullum v. Emanuel*, *supra*; *Hayes v. Ward*, 4 Johns. Ch. 123; 8 Am. Dec. 554; *Commonwealth v. Miller*, 8 S. & R. 452; *Everly v. Rice*, 20 Penn. St. 297; *Baker v. Briggs*, 8 Pick. 122; 20 Am. Dec. 311.

The principles defining, in particular circumstances, the good faith which the creditor must observe toward the surety, aid materially in determining what are his duties under other circumstances in which he may have the means of obtaining payment from the principal. Good faith is not a mere absolute, inflexible phrase, existing of and by itself. It is a relative term, and must always be considered in reference to the relation of the parties — the confidence existing, or which may be justly reposed, and the circumstances surrounding them, when it may or may not require the one party or the other to act, or a want of it may be deduced from inaction. A creditor may not have in his possession, or under his control, property or effects, which he has the right to retain for the payment of the debt, and to which right the security would be entitled on payment made by him. Having them, as we have seen, the law compels him, if he would preserve the liability of the surety to him, to good faith and reasonable diligence in keeping and making them available. The payment of the debt by the principal, to whom the consideration has moved, and who is primarily liable, and bound to indemnify the surety, if he is compelled to make payment, is the great, controlling object in view. Now, if the principal tenders payment in full, after the debt is due, the creditor is bound to accept it, or the surety will be discharged. It is bad faith toward the surety, on the part of the creditor, to refuse; for he may thereby invert the order in which principal and surety are liable, as between themselves; and he changes the nature and character of the liability of the surety, compelling him to guarantee for a further and additional period of time the ability of the principal to make the payment. The tender having been made,

the relation of the creditor and principal is changed — the only duty of the principal is to keep the tender open ready for the acceptance of the creditor whenever he manifests it. If he is sued by the creditor, he may bring into court the sum tendered, without any accruing interest, or compensation for the forbearance during the intervening period. There is, in effect, a new loan to the principal, payable on demand, without interest, to which the surety is not a party, and gives no assent. Brandt on Suretyship, § 295, and authorities cited in note. We speak now of cases in which there is a formal tender, and a refusal to accede to it by the creditor, which would constitute a defense for the principal, if he kept it open and ready for acceptance.

There is another class of cases, which the present case more nearly resembles, in which there may not be the formalities of a tender, and no fact or circumstance affording the principal any defense against the claim of the creditor, or which places them in the relation of adversaries. There may be an offer of payment, which the principal may, at the request of the creditor, and for his ease and accommodation, forbear from converting into a formal tender, absolving him from liability for future interest, and for the costs of suit, if he kept the tender open. To this class belongs the case of *Clark v. Sickler*, 64 N. Y. 231 ; s. c., 21 Am. Rep. 606, referred to by the chancellor. The principal, Mott, then being solvent, but subsequently becoming insolvent, offered to pay the debt; but the creditor declined to receive payment, giving no other reason than that he had no use for the money, and requested Mott to keep it; to which he assented. It was held that the surety was not discharged; that the indulgence to the surety was merely gratuitous, not compelling the creditor to delay for any definite period of time, and not disabling him from suing, or taking any other step for the payment of the debt the surety had a legal right to require him to take.

There is an obvious distinction between that case and the present. If the surety had immediately paid the debt, Mott being solvent, his remedies for reimbursement would have been equal to any the creditor could have pursued. In this case, the principal was dead, and his estate insolvent. If the surety paid the debt, he would have been a mere general creditor of the principal, entitled only to share with other like creditors in the distribution of the assets, diminished, as they must be, by the payment of preferred claims. If the

creditor had accepted payment, as proposed by the administratrix, and as it was her right to propose, and as he had the right of accepting, the debt would have been extinguished in full, and without offending the rights of other creditors, whether preferred or general. *Pitcher v. Patrick*, Minor, 321; *Perrins v. Warren*, 3 Stew. 151; *Godbold v. Roberts*, 7 Ala. 662. In his transactions with the administratrix of the principal, good faith to the surety required, that the creditor should not be unmindful of, and indifferent to, the injury he was directly, and for no assigned reason, inflicting of his own volition. It is a duty the creditor owes the surety, in his dealings with the principal, to protect, so far as he can consistently with the preservation of his own rights, the rights and interests of the surety. Their right and interest is indeed the same — the performance of the contract, or the payment of the debt — the right of the creditor to payment or performance from principal or surety, one or both — the right of the surety to payment or performance primarily by the principal. A creditor, who voluntarily interposes obstacles, which prevent the surety from pursuing the creditor according to the remedies the law affords him, would not be allowed to recover of the surety. If he declines or refuses accepting payment from the principal, when it is offered, and the means of making the payment are in his own hands, which he surrenders to the principal, though he could rightfully retain them, and he knows that the result of his conduct will inflict irreparable loss on the surety, it is difficult to abstain from imputing to him a want of *good faith*, or of distinguishing between his conduct and an interposition of obstacles preventing the surety from being fully indemnified. The liability of the surety, which could be immediately extinguished, is, without his assent, prolonged. Not only is it in this case prolonged, but the death and insolvency of the principal in fact increases its burdens; for he cannot obtain from the estate of the principal full indemnity, when the creditor may elect to compel him to payment.

As the case is now presented, without any explanation of his conduct from the creditor, it is a little difficult to avoid the inference, that there was a design on his part to fasten on the property of the surety a liability for the debt, in case of the estate of the principal. If that be true, there can be no doubt the law condemns his conduct, and relieves the surety, whose rights and interests he was bound to respect, and compels him to look for payment to the prin-

cipal, whom he intended to favor at the expense of the surety. In *Sears v. Van Dusen*, 25 Mich. 351, the holder of a promissory note refused to receive payment, when tendered by the makers, and delayed its collection until they became insolvent. This conduct, it was held, discharged the payee, who had guaranteed unconditionally the payment of the note, and whose relation is not distinguishable from that of a surety. *Donley v. Camp*, 22 Ala. 659. It is to be remarked of this case, that there was no formal tender, changing the condition of that of the makers to the duty of keeping the tender open for the acceptance. There was a mere offer of payment (without presenting the money, and without evidence that the makers then had it, save so far as it could be inferred from their credit and business), which the holder declined, because he did not need the money. It was for his ease and accommodation, that the payment was not made.

In *McQuesten v. Noyes*, 6 N. H. 19, there was an offer of payment by the principal, but the creditor did not accept it, and made a mere general agreement that he would wait for payment and the principal could retain the money. The court regarded the transaction as a new loan of the money to which the surety was not a party. In *Sailly v. Elmore*, 2 Pai. 497, it is said by Chancellor WALWORTH that a surety will be discharged by any arrangement or dealing between the principal debtor and the creditor which operates as a fraud on the surety, "as if the money had been offered to the creditor at the day it fell due, or afterward, and he had, without the consent of the surety, requested the debtor to retain it longer, this would operate as a fraud upon the surety and discharge his liability." In *Joslyn v. Eastman*, 46 Vt. 258, there was a tender of payment by the principal which the creditor declined receiving, and it was held that the surety was discharged. The tender was of a character which would have discharged the principal if he had kept it open, and as it would have discharged him it discharged the surety, whose obligation was accessorial—he could not be compelled into the new relation of a guarantor that the principal would keep it open for the creditor when he chose to manifest a willingness to accept it. To the same effect are the cases of *Johnson v. Ivey*, 4 Cold. 608; *Hayes v. Josephi*, 26 Cal. 535; *Curia v. Packard*, 29 id. 194.

There is another class of cases which seem to be the subject of a conflict of decision, when a creditor, having in his possession or

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under his control the means of satisfying the debt, yet chooses not to make the appropriation, and voluntarily parts with them. It may be conceded that ordinarily a creditor is not bound to assert and exercise the right not existing at common law, conferred by statutes, of setting off the demand or debt he may have against the principal and surety, against a demand or debt which may be due from him to the principal. The assertion of such right might involve him in litigation with the principal into which it may not in the absence of peculiar circumstances be his duty to enter. The failure to assert the right, compelling suit by the principal, can be no more than his mere passiveness, in the absence of peculiar circumstances, in pursuing legal remedies, for the plea of set-off is in its essence a cross-action. To this class belong the cases of *Glazier v. Douglass*, 32 Conn. 393; *Hollingsworth v. Tunner*, 44 Ga. 11. *Beaubien v. Stoney*, Speer's Eq. 508, to which we have been referred. We do not dissent from the conclusion reached in these cases, nor do we now intend intimating under what circumstances it would be the duty of the creditor to insist on a right of set-off against the principal for the ease of the surety.

The present case stands on a different ground. There was no necessity for the creditor to assert it — no peril of litigation with the principal if he made the claim. The means of payment were in his hands, and it was his duty; the principal, by his proposal that they should be applied in payment of the debt, placing him in no other position than that of accepting or refusing the proposition. He had simply to retain instead of paying the money to the principal, and the retainer operating not only to extinguish the liability of principal and surety, but his own liability to the principal. In *Law v. East India Company*, 4 Ves. 824, the creditor had made a settlement with the personal representative of the principal, and paid to him a balance supposed to be due the principal on a settlement of his accounts as an officer of the company. Subsequently a claim was made upon Law as a surety on the official bond of the principal, and it was held he was discharged. The case was attended by peculiar circumstances influencing its decision, but the underlying principle is that the creditor must do no act which may injure the surety, and if he does such an act, borrowing the words of the master of the rolls, "the court is very glad to lay hold of it in favor of the surety."

In *McDowell v. Bank*, 1 Harr. (Del.) 369, the creditor, a bank,

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had on general deposit moneys of the principal sufficient to pay the debt, but permitted the principal from time to time after maturity of the debt to withdraw them by checks, and the surety was held discharged. The same principle is recognized in *Dawson v. Real Estate Bank*, 5 Ark. 296-99. The cases of *Martin v. Merchants' Bank*, 6 Harr. & Johns. 235; and *Voss v. German Am. Bank*, 83 Ill. 599; s. c., 25 Am. Rep. 415, assert the contrary doctrine. Assuming, as we think it must be assumed, that a bank has a lien on any balance which may be due from it to a customer on any moneys he may have on general deposit—not moneys deposited for special purposes, of which the bank is informed, and either expressly or impliedly consents to hold for such purposes—for the payment of a debt due to it for money borrowed, or for a debt negotiated to it in the usual course of trade; we incline to the opinion that it cannot pay such balance or such moneys to the principal without discharging the surety. It has not the option to part with the security it has acquired without the consent of the surety. We are not trammelled by the broad expressions found in *Perrine v. Firemen's Ins. Co.*, 22 Ala. 575, from which we expressed dissent in *Knighton v. Curry*, MSS.

Affirming a proposition that meets the present case, we hold, that when the principal offers the creditor the privilege of retaining, from moneys the creditor has in his hands, and is about paying to him, the debt due him from principal and surety, good faith to the surety requires him to accept; and if he refuses, when he could rightfully retain, without prejudice to the rights or equities of others, the surety is discharged. There is more, in such case, than mere passiveness on the part of the creditor—there is positive action in the refusal to accept the payment. More especially must this be true, when the creditor is dealing with the principal, in the absence, and without the knowledge of the surety. The case has its unpleasant features, which, unexplained, if they do not create a presumption of sinister motive, cast suspicion on the conduct of the appellee. It is so much out of the course of ordinary transactions for a debtor to pay his creditor a large sum of money, without the deduction of a debt the creditor expresses a willingness to receive, that when immediate injury must result to another, it is difficult to resist the conclusion the injury was intended. No importance can be attached to the fact that there is no averment in the bill, that the attorney (Day) had specific au-

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thority to propose receiving the debt in payment, or as money, from the appellee. It does not appear that the refusal of the appellee was placed on that ground, when the proposal was made; and if the fact is, that he was without authority, how far the equity of the appellant is affected will arise on a hearing on the evidence.

The bill showing that the surety was discharged from personal liability by the conduct of the appellee, the mortgage he had executed, which passed the legal estate in the premises, and was but a further security for the payment of the debt, was also discharged. It was but an incident of the debt of the surety, and could not survive its discharge, or extinguishment, or a voluntary release of it by the creditor. Brandt on Suretyship, § 21. The principal has not been discharged; and the mortgage remains a valid security on his equity in the premises. The sale the appellee was proposing to make, was a sale not only of this equity, but of the legal estate; and there can be no doubt of the power of a court of equity to restrain it.

The decree must be reversed, the injunction reinstated, the demurrer and motion to dismiss overruled, and the cause remanded.

Decree reversed and cause remanded.

ACKLEN'S EXECUTOR V. HICKMAN.

(68 Ala. 494.)

Evidence — memorandum.

A witness may refresh his memory by examining a memorandum made by himself, or known and recognized by him as stating the facts truly, when, after such examination, he can testify to the facts as matter of independent recollection; but the memorandum itself is not thereby made evidence. If the memory of the witness is not refreshed by an examination of the memorandum, so that he can testify to the facts as matter of independent recollection, but he can nevertheless testify, that at or about the time the memorandum was made, he knew its contents, and he knew them to be true, his testimony and the memorandum are both competent evidence; but if he did not know the contents of the memorandum to be true when it was made, although he saw it made, the memorandum is not admissible evidence. (*See note, p. 56.*)

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ACTION on common counts. The opinion states the point.

Walker & Shelby, for appellant, cited *Kelsea v. Fletcher*, 48 N. H. 282; *Haven v. Wendell*, 11 id. 112; *State v. Shinborn*, 46 id. 504; *Vastbinder v. Metcalf*, 3 Ala. 100; *Olds v. Powell*, 10 id. 399; *Rutherford v. Br. Bank of Mobile*, 14 id. 92; *Russell v. Hudson R. Co.*, 17 N. Y. 134; *Meacham v. Pell*, 51 Barb. 65; *Rogers v. Burton*, Peck, 108; *Beets v. State*, Meigs, 106; *McGehee v. Greer*, 7 Port. 538; *Knight v. Clements*, 45 Ala. 94; s. c., 6 Am. Rep. 693; *Crawford v. Br. Bank*, 8 Ala. 79; 1 Whart. Ev. 521-2; *Coffin v. Vincent*, 12 Cush. 98.

Humes & Gordon, contra.

STONE, J. The law recognizes the right of a witness to consult memoranda in aid of his recollection, under two conditions: First, when after examining a memorandum made by himself, or known and recognized by him as stating the facts truly, his memory is thereby so refreshed that he can testify, as matter of independent recollection, to facts pertinent to the issue. In cases of this class, the witness testifies to what he asserts are facts within his own knowledge; and the only distinguishing difference between testimony thus given, and ordinary evidence of facts, is that the witness, by invoking the assistance of the memorandum, admits that without such assistance, his recollection of the transaction he testifies to had become more or less obscured. In cases falling within this class, the memorandum is not thereby made evidence in the cause, and its contents are not made known to the jury, unless opposing counsel call out the same on cross-examination. This he may do, for the purpose of testing its sufficiency to revive a faded or fading recollection, if for no other reason.

In the second class are embraced cases in which the witness, after examining the memorandum, cannot testify to an existing knowledge of the fact, independent of the memorandum. In other words, cases in which the memorandum fails to refresh and revive the recollection, and thus constitute it present knowledge. If the evidence of knowledge proceed no further than this, neither the memorandum, nor the testimony of the witness, can go before the jury. If, however, the witness go further, and testify that at or about the time the memorandum was made, he knew its contents,

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and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum. The two are the equivalent of a present, positive statement of the witness, affirming the truth of the contents of the memorandum. 1 Greenl. Ev., §§ 436-7; *Bondurant v. Bank*, 7 Ala. 830.

Under these rules, the Circuit Court erred in allowing the memorandum to be given in evidence to the jury. The court erred, also, in allowing the witness to refresh his recollection, by the credit indorsed in the handwriting of Hickman. True, he stated he saw the indorsement made; but he did not testify that he knew, or ever had known, it contained a true statement of the facts. If he had testified that he saw the indorsement made, and observed its contents, and knew at the time that they were true, this would have brought the testimony within the second of the rules stated above, and would have let in both the testimony and the memorandum, notwithstanding the witness, at the time of the trial, had no independent recollection of the facts shown by the indorsement.

[Omitting a minor question.]

Reversed and remanded.

NOTE BY THE REPORTER.—In *Howard v. McDonough*, 77 N. Y. 592, the court laid down the rule as to the use of memoranda as follows: "The law as to the use of memoranda by witnesses while testifying is quite well settled in this State. 1. A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed, and when his memory has thus been refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence. 2. When a witness has so far forgotten the facts that he cannot recall them, even after looking at a memorandum of them, and he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired, which he intended to make correctly, and which he believes to be correct, such memorandum, in his own handwriting, may be received as evidence of the facts therein contained, although the witness has no present recollection of them. 3. Memoranda may be used in other cases which do not precisely come under either of the foregoing heads. A store of goods is wrongfully seized, and an action is brought to recover for the conversion. There are thousands of items. No witness could carry in his mind all the items and the values to be attached to them. In such a case, a witness may make a list of all the items and their values, and he may aid his memory while testifying by such list. He must be able to state that all the articles named in the list were seized, and that they were of the values therein stated, and he may use the list to enable him to state the items. After the witness has testified, the memorandum which he has used may be put in evidence, not as proving any thing of itself, but as a detailed statement of the items testified to by the witness. The manner in which the memorandum, in such a case, may be used is very much in the discretion of the trial judge. He may require the witness to testify to each item separately, and have his evidence recorded in the minutes of the trial, and then the introduction of the memorandum will not be important; or he may allow the witness to testify quite generally to the items and their values; and receive the memorandum as the detailed result of his examination, leaving to the adverse party a more minute cross-examination. Without the use of a memorandum in such cases, it would be difficult, if not impossible, to conduct a trial involving the examination of a large number of items. *Driggs v. Smith*, 36 N. Y. Superior Court, 302, affirmed in this court. *McCormick v. Penn. Central R. R. Co.*, 49 N. Y. 308."

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In *Commonwealth v. Ford*, Massachusetts Supreme Court, January, 1881, to contradict a witness for the prosecution, in regard to his former testimony, the defendant called a newspaper reporter, who had reported the proceedings in which the former testimony was given, and from whose report an account of those proceedings had been printed in his newspaper, and asked that the reporter be allowed to refresh his recollection from the printed account, no search having been made for the written report, but the reporter supposing it had been destroyed, and knowing that the printed account was in accordance with his written report. The request was declined. The prisoner's exception to this ruling was sustained. The court observed: "The witness should have been allowed, for the purpose of refreshing his memory, to look at the printed report, which he stated, as of his own knowledge, was printed substantially as made by him. It was not contended that the written or printed report or any portion of their contents could be put in evidence. They were clearly incompetent in any aspect of the case as presented. The rule therefore, that to prove by oral testimony the contents of a paper relied on as evidence, it is necessary first to show that it has been lost or destroyed, or that upon diligent search it cannot be found, has no application to this case. In order to refresh the recollection of a witness, it is not important that the paper, book or memorandum should have been written or printed by the witness himself, or that it should be an original writing. It is sufficient if he saw it while the facts stated therein were fresh in his memory, and he knows that they are correctly transcribed or printed. Upon inspecting it, he can state the facts, if thereby called to his recollection. 1 Greenl. Ev., §§ 436-439; *Chapin v. Lapham*, 20 Pick. 467. See *Ogden v. Vincent*, 12 Cush. 98; *Kensington v. Inglis*, 8 East, 278. The case most resembling the case at bar is *Horne v. McKenzie*, 6 Cl. & Fin. 628. See also *Rees v. Duchess of Kingston*, 20 How. St. Tr. 619; *Burton v. Plummer*, 3 A. & E. 341; *Huff v. Bennett*, 6 N. Y. 337." In *Horne v. McKenzie*, *supra*, a surveyor was allowed to refresh his memory by an extract from his field-notes, embodied in a printed report made by him, and verified by him as correct.

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(63 Ala. 547.)

Negotiable instrument—municipal bonds, when are not.

Authorized municipal bonds, payable to bearer, on the completion of a specified railroad, are not negotiable paper.

TROVER for municipal bonds. The opinion states the facts. The defendant had judgment below.

D. Clopton, for appellant.

S. F. Rice and *W. A. Gunter*, contra.

BRICKELL, C. J. The action is trover, for the conversion of one hundred and eighty bonds of the city of Troy, for the payment to bearer of the sum of one hundred dollars each, in ten annual in-

stallments, with interest at eight per cent per annum from date, the 13th January, 1869. In December, 1869, eighty of these bonds were by the plaintiff deposited with his son-in-law, one M. B. Locke, who was a merchant, banker and factor, residing and doing business at Union Springs, the place of plaintiff's residence. The remaining one hundred bonds had been deposited for plaintiff with the firm of Epping & Howard, of Columbus, Georgia, on the 27th of December, 1869; an order to them was given him, for their delivery, which he indorsed as follows: "Please deliver to M. B. Locke, or order;" signed "H. Blackman." The eighty bonds were left with Locke for safe-keeping, and the order for the others indorsed to him that he might get them for the same purpose. Locke was directed to ascertain on what terms the plaintiff could raise money on the bonds, but was not authorized to dispose of them in any manner whatever. He was largely indebted to Lehman Brothers, of New York. The defendants, Lehman, Durr & Co., a firm in Montgomery, two of the members of which were members of the firm of Lehman Brothers, through one Mitchell, undertook the settlement of this indebtedness. The indebtedness of Locke amounted to about thirty thousand dollars. He conveyed to the defendants real estate, valued at twenty thousand dollars, and transferred by delivery the one hundred and eighty bonds of the city of Troy; and the defendants gave him their drafts on Lehman Brothers, for thirty thousand dollars, which he used in paying his indebtedness to them. These drafts were by the defendants credited to Lehman Brothers, and they charged the defendants with them. Locke gave the defendants a sale-bill of the bonds, but they were not indorsed by the plaintiff, or any one else. The defendants had no notice of the plaintiff's right or claim to the bonds, when they obtained them from Locke, which was on the 13th April, 1870. The value of the bonds, and a demand of them before the commencement of this suit, was proved. The instructions given by the City Court, in substance, deny that on this state of facts the plaintiff could recover.

These bonds were issued by the city of Troy, a municipal corporation created by the laws of this State, under the authority of an act of the general assembly, approved December 8, 1868, by which the city was authorized to subscribe a sum, not exceeding seventy-five thousand dollars, to the capital stock of the Mobile and Girard Railroad, and to issue bonds, bearing eight per cent in-

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interest, in payment of such subscription. The act declares, "None of said bonds, or interest thereon, shall be due or payable, until said railroad is in running order, and the cars run to said Troy." Pamph. Acts, 1868, pp. 395-7. The bonds refer to this act, and in one part recite, "Payments to commence at the date of the completion of said railroad to Troy, Alabama"; and in another, that payments are to be made in "ten annual installments, together with the interest thereon that may have accrued thereon, on demand, after the completion of the Mobile and Girard Railroad, to the said town of Troy, Alabama; payments to be made at the office of the treasurer of the town of Troy, Alabama." On the 20th January, 1870, two acts of the general assembly were approved; the one legalizing the subscription of the city to the railroad, and the bonds issued in payment of it; and the other providing for the payment of the bonds, by the real-estate owners of the city, as the same shall fall due. Pamph. Acts, 1869-70, pp. 39-42.

"It is a principle, almost universal in its application, that no man's property can be taken from him without his consent, express or implied, except by due process of law. The maintenance of the principle is essential to the peace and safety of society; and the insecurity which would follow from any departure from it would cause far greater injury, than any which can fall, in cases of unlawful appropriation of property, upon those who have been misled and defrauded." *Telegraph Co. v. Davenport*, 97 U. S. 369.

In England, there is a deviation from the principle, in cases of sales made in market overt. 3 Black. 172; Benjamin on Sales, 7. This deviation is not recognized in this country; and the general maxim of our jurisprudence is, *Nemo in alium potest transferre plus juris quam ipse habet*. Hilliard on Sales, 23; *Williams v. Merle*, 11 Wend. 80; *Leigh v. M. & O. R. R. Co.*, 58 Ala. 165.

An exception to this rule, firmly established, is that of negotiable or commercial paper, transferable by delivery. The holder of bank-notes, bills of exchange, promissory notes, the ordinary coupon bonds of corporations, or of the State, or of the United States, passing by delivery, transferring them before dishonor, for value, to a *bona fide* purchaser, though he may have obtained them feloniously, or fraudulently, or though he may by the transfer exceed his authority, or violate trust and confidence reposed in him, can confer a title he has not, or greater than he had,—a title freed from all infirmity, and which will prevail over that of the true owner.

Rumball v. Metropolitan Bank, 20 Eng. (Moak) 276; *Murray v. Lardner*, 2 Wall. 110; *State of California v. Wells*, 15 Cal. 336; *Spooner v. Holmes*, 102 Mass. 503; s. c., 3 Am. Rep. 491; *Welch v. Sage*, 47 N. Y. 143; s. c., 7 Am. Rep. 423; *Seydel v. National Bank*, 54 N. Y. 288; s. c., 13 Am. Rep. 583. The exception is founded on the commercial policy of sustaining the credit and circulation of negotiable paper. 3 Kent Com. 79. It applies only to paper of that character. As to all other paper, an assignee or transferee succeeds to and is clothed with the rights only of the transferrer or assignor.

A bill, or note, or other instrument, cannot fall within the operation of this exception, nor is the transferee thereof entitled to protection against the right or title of the true owner, unless it is payable absolutely and unconditionally. The rule is thus stated in *Chitty on Bills*: "The money must be payable at all events — not dependent on any contingency, either in regard to event, or with regard to the fund out of which payment is to be made." *Chitty on Bills*, 134, marg. The rule applies to all kinds of commercial paper. In reference to a promissory note, it is stated, "to make a written note for the payment of money a valid promissory note, the money must be payable absolutely, and at all events, and not be subject to any condition or contingency." *Story on Prom. Notes*, § 22.

Whether an instrument is commercial — is of the character entitling it to the peculiar protection afforded by the law to paper of that kind — must appear on its face, or a contemporaneous memorandum on the same paper. Its character depends upon its terms at the time it is made, and if it then purports a payment to be made upon a contingency, or a condition or uncertain event, the subsequent happening of the event or contingency will not change it. *Story on Prom. Notes*, §§ 22–24. The reason of the rule, it was well said by Lord KENYON in *Carlos v. Fancourt*, 5 T. R. 483, is, "that it would perplex the commercial transactions of mankind if paper securities of this kind were issued out into the world incumbered with conditions and contingencies, and if the parties to whom they were offered in negotiation were obliged to inquire when the uncertain events would probably be reduced to a certainty." And in the same case ASHURST, J., said: "Certainty is a great object in commercial instruments, and unless they carry their own validity on the face of them they are not negotiable. On

that ground bills of exchange which are payable only on a contingency are not negotiable because it does not appear on the face of them whether or not they will ever be paid. The same rule then that governs bills of exchange in this respect must also govern promissory notes."

In *Cota v. Buck*, 7 Metc. 588, it is said by SHAW, C. J., that "the true test of the negotiability of a note seems to be whether the undertaking of the promisor is to pay the amount at all events at some time which must certainly come, and not out of a particular fund or upon a contingent event. If it were payable on a contingency or out of a particular fund it would not be negotiable." A note promising to pay a certain sum of money for staves at two dollars per thousand, subject to a deduction for any number not procured, is not a promissory note. *Martin v. Woodall*, 1 St. & Port. 244. A note payable to bearer six months after date for a certain sum, provided the ship may arrive at an European port of discharge free from capture and condemnation by the British, is not a promissory note. *Coolidge v. Ruggles*, 15 Mass. 387. An order for the payment of fifteen hundred dollars, "at sight, after the arrival and discharge of coal by brig G, to the order of myself," is not a bill of exchange. *Grant v. Wood*, 12 Gray, 220.

The principle on which these and numerous decisions rest is, that no instrument is commercial — is a bill of exchange or a promissory note — unless it is payable at all events. If payment depends on a contingency which may never happen it is not commercial. But if the event must certainly happen, the uncertainty of time when it will happen will not render the instrument a mere special agreement or contract. The time of payment may be in suspense, and may so continue indefinitely, but if it will inevitably happen, and the instrument has the other requisites, it will be regarded as a promissory note or bill of exchange. *Sackett v. Palmer*, 25 Barb. 179.

The bonds of a municipal corporation, or of a private corporation having authority to issue them, payable to bearer or order, are commercial or negotiable if they have the essential requisites of negotiable paper. Though sealed instruments find their recognition, validity and operation in the ancient rules of the common law, while bills of exchange and promissory notes find their origin and sanction and peculiar characteristics in the law merchant or in statutes intended to facilitate their circulation, the bonds of corpo-

rations, though under seal, after some vacillation of judicial decision come to be recognized as on an equality with bank-notes and bills of exchange. A full collection of the authorities, State and Federal, will be found in 1 Wait's Actions & Defenses, 688. But like bank-notes or bills of exchange or promissory notes, they must in themselves contain every essential requisite of negotiability. Where these are found in them, although they may be under the corporate seal, as every act of a corporation must have been manifested according to the ancient common law, the seal will not destroy their negotiability. But the seal will not confer negotiability unless these requisites are found. Corporations may contract on conditions or uncertain events, or on contingencies, as well as absolutely and unconditionally, and if they do such contracts have the same operation as the like contracts of individuals.

Without the aid of a special statute, the original act of incorporation not conferring the power, the city of Troy could not have issued negotiable paper. *Police Jury v. Britton*, 15 Wall. 566; *N. M. & C. R. R. Co. v. Dunn*, 51 Ala. 128. Whether the power should be conferred rested in the legislative discretion. While the legislature conferred on the city the power to subscribe to the capital stock of the Mobile & Girard Railroad, and to issue bonds to pay the subscription, it is expressly provided that "none of said bonds or interest thereon shall be due or payable until said railroad is in running order and the cars run to Troy." The bonds stipulate expressly on their face that until this event happens neither the bonds nor the interest thereon is payable. This is not an event which it can be said would certainly happen; not mere doubt, suspense as to the time of its happening, but uncertain whether it would happen, as uncertain as when a ship would arrive from sea or discharge her cargo. The city was authorized to subscribe to the stock of the railroad corporation, not so much for the benefits which would accrue from membership in it, or for the dividends which would be derived from the ownership of the stock. Such considerations would probaby influence individuals; but a public corporation, created mainly for governmental purposes, would be authorized to make such a subscription, because of the incidental advantages to be derived from the completion of the road to its locality — the improved facilities for transportation and travel to and from it — the apprehended increase of its business, its trade, and industries. That payment for the stock should depend upon the completion of

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the road to the city, is a provision inserted in the bond for the protection of the city, and inserted in obedience to the command of the statute. The legislature did not confer power to issue negotiable paper—it did not intend that such power should be exercised. When the railroad was completed, yielding to the city the advantages and benefits contemplated, and which was the consideration moving the legislature to confer the power to subscribe for the stock, then the bonds were to be payable. The bonds are wanting in the essential element of negotiability, certainty of time of payment. Not being negotiable according to their terms, they could not become so by matter *ex post facto*. The subsequent completion of the railroad cannot change the character impressed on them at the time they were made. *Kelly v. Hemingway*, 13 Ill. 604; Story on Prom. Notes, § 22.

Bills of exchange, promissory notes, or other negotiable paper, must be certain, not only as to the engagement to pay, the amount payable, and the fact or event of payment, but they must be certain as to the payee. "It is equally essential," says Judge STORY, "that the person, to whom the note is payable, should be clearly expressed, and made known upon the face of the note; for parol evidence is not admissible to show to whom it is payable; and in instruments designed for circulation, it is of the highest importance to know, to whom its obligations apply, and from whom a title can be securely derived." Story on Prom. Notes, § 35. The payee need not be named, but on its face the instrument must afford an indication or designation by which he can be certainly ascertained, the maxim applying, *id certum est quod certum reddi potest*. 1 Dan. Neg. Inst., § 99. A bill may be drawn and negotiated, with a blank left for the name of the payee. Such a bill imports an authority from the drawer to a *bona fide* holder, to fill the blank with his own name; and such holder, perfecting the bill, may recover of the drawer. Chitty on Bills, 156; *United States v. White*, 2 Hill, 57.

In England, and in many of the States, a bill may be payable to bearer only; and then it becomes a promise to pay whoever may be the holder, and title to it will pass by mere delivery. So, if it is payable to A. B. or bearer, title will pass by delivery. Whether notes or bills, so framed, are negotiable, depends on the law of the place in which they are made and payable. It is within the sovereign power of each State, not offending the inhibition of the Federal Constitution, by laws impairing the obligation of contracts already

made, to regulate the making, construction, and validity, formalities and authentication of contracts, which are entered into, or to be performed within its territory. The legislature may enlarge, or may diminish, the character of paper which is negotiable — may add to or deprive it of the characteristics and qualities which distinguish it from other contracts.

We have statutes, which not only define the particular instruments which are governed by the commercial law, but change and modify many of the rules of that law. Bills of exchange, and promissory notes, payable in money at a bank or private banking-house, or a certain place therein designated, are the only instruments, which, under our statutes, are subject to the commercial law. Bank-notes, intended to circulate as money, would also be subject to that law; for these as well as bills of exchange and promissory notes, payable at a bank or banking-house, are exempt from set-off, discount, or payment, had or possessed previous to notice of transfer. It is expressly declared, that all bonds, bills or notes, except those issued to circulate as money, payable to any thing or bearer, to any fictitious person or bearer, or to bearer only, must be construed as payable to the person from whom the consideration moved; if payable to an existing person or bearer, must be construed as payable to such person or order." Code of 1876, § 2098. The original of this statute was entitled "an act to prevent fictitious suits in the courts of the United States;" and it will be found in Clay's Digest, 326, §§ 326-7. It was first construed in *Clark v. Field*, 1 Ala. 468, in which it was held, that under its operation, the legal title to a promissory note payable to S. W. B. or bearer, could not be derived otherwise than through the indorsement of the payee, S. W. B. In *Kemper and Nozabee N. & B. v. Schieffelin & Co.*, 5 Ala. 493, it was held not to extend to bank-notes. In *Sawyer v. Patterson*, 11 Ala. 523, it was decided the statute did not extend to a blank indorsement, or an indorsement to bearer.

Such was the construction the statute had received prior to the Code of 1852. Into that Code it was introduced, in its present form. It is of frequent occurrence in that, and the present Code, that in the re-enactment of pre-existing statutes, the construction which judicial decision had placed upon them was embodied, or that the words of the statute were changed so as to conform to that construction. In this statute, we now find that bills or notes *issued to circulate as money* are excepted from its

operation. These are still, as by the law-merchant, if payable to bearer, deemed payable to every holder thereof, and the legal title passes by delivery. Such was the construction of the former statute. The former statute declared instruments payable to any person, or to any corporation, or bearer, should have the effect of creating an obligation or liability in favor only of the person or corporation to whom it was expressly payable. It may well be doubted whether the former statute embraced any instrument payable to *bearer* only. The present statute embraces not only such an instrument, but every instrument (except bills or notes issued to circulate as money) which is payable to any thing, or to any fictitious person, or *bearer*; and such instruments are not to be construed as payable to whoever may be the holder, but *to the person from whom the consideration moves*. If payable to an existing person or *bearer*, then it is construed as payable to such person, or order. The policy of the statute is to deprive instruments of negotiability, which do not on their face clearly indicate to whom their obligations apply, and from whom title can be securely derived; that title to negotiable instruments, which prevails over the title of the true owner, or over the equities of the original parties, shall be derived only by an indorsement in writing from him to whom they are expressly payable. Such, it is said by Judge STORY, was at one time the law of France; because it was found that bills of exchange, payable to bearer only, or in which a blank was left for the name of the payee, became a cover of fraud and usury. Story on Prom. Notes, § 38.

These bonds are payable to bearer only. If they had every other ingredient of negotiability, they could not, in obedience to the statute, be construed otherwise than as payable to the person from whom the consideration moved to the maker, when they were issued. So construing them, the legal title to them could be derived only through his indorsement. These are valid contracts, or engagements to pay money to the person from whom the consideration originally moved, on the happening of the event expressed in them. The legal title to them can be derived only through the indorsement or assignment of that person. *Gookin v. Richardson*, 11 Ala. 889. Whoever obtains possession of them, without such assignment or indorsement, holds in subordination to it, and in subordination to all prior rights and equities.

The possession of the plaintiff was sufficient to support the pres-

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ent action of trover, against the defendants acquiring possession, without title, from his bailee. The defendants are, equally with the bailee, from whom they obtained possession, estopped from denying the title of the plaintiff. *Lowremore v. Berry*, 19 Ala. 130; *Cook v. Patterson*, 35 id. 102; *Donnell v. Thompson*, 13 id. 440.

The result of these views is, that the city court erred in charging the jury the plaintiff was not entitled to recover, if they believed the evidence, and in refusing to charge them, on request, that he was entitled to recover.

Let the judgment be reversed, and the cause be remanded.

STONE, J., not sitting.

Reversed and remanded.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

HANKS V. NAGLER.

(54 Cal. 51.)

Contract — of marriage — when immoral.

A promise of marriage in consideration that the promisee should before marriage have sexual connection with the promisor is void. (*See note, p. 68.*)

ACTION for breach of promise of marriage. The opinion states the facts. The plaintiff had judgment below.

McAllister & Bergin, for appellant.

Alex. Campbell and *D. M. Delmas*, for respondent.

By the COURT. This is an action for a breach of promise of marriage. The alleged promise is denied by the answer. The plaintiff was examined as a witness in her own behalf, and testified in substance that the agreement between the parties was, that the plaintiff should then presently surrender her person to the defendant, and that in consideration of such surrender the defendant would afterward marry her. "He promised me that if I should give up myself to him, that he should marry me."

"Q. What did you say to that?"

"A. At first I refused ; at last I, of course, gave myself up to him."

1st. Upon well-settled principles the plaintiff should not have recovered upon a contract of this character. As being a contract for illicit cohabitation, it is tainted with immorality. Story on Cont. § 458; *Steinfeld v. Levy*, 16 Abb. N. S. 26, and other authorities cited in appellant's brief.

2d. But this question was not made below, nor is the record here in such a condition as would, under the settled rules of practice, permit us to determine the case upon this point.

3d. But the court below in stating to the jury "the elements of injury which go to make up the sum total of damage," which the plaintiff might be considered to have sustained, instructed them as follows: "Next, if * * * the defendant, taking advantage of the promise under which she (the plaintiff) was acting, has had illicit relations, and has seduced the plaintiff, that is another element proper for the jury to consider," etc. But the evidence which we have just detailed, coming as it did from the mouth of the plaintiff herself, shows that this case is not one of the character assumed by the court as the basis for this instruction. It was confessedly not a case in which the defendant, taking advantage of the trust and confidence which may be fairly supposed to exist between parties who have in apparent good faith made mutual promises of marriage, has abused the confidence of a female, and induced her to yield him favors which she might have otherwise withheld. The agreement to yield her person to him was one appearing to have been deliberately made in advance, and when there had been no promise of marriage. It is clear, therefore, that the hypothesis upon which this instruction was based could not be assumed by the jury for the purpose of fixing the amount of damages the plaintiff was to recover.

Judgment and order denying a new trial reversed, and the cause remanded for a new trial. Remittitur forthwith.

Reversed and remanded.

NOTE BY THE REPORTER.—The case of *Steinfeld v. Levy*, 16 Abb. (N. S.) 26, is exactly in point. The action was in the Brooklyn city court, the opinion by NEILSON, C. J. The court observed: "It is hardly necessary to say that a contract thus grossly immoral would not support the action." "The learned presiding judge seems to have had in view the rule that where a contract is founded on two considerations, one of which is merely void, but not vicious, and the other good, the contract is binding to the extent of the good consideration. He ruled that if in fact mutual concurrent provisions to marry were a part of

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the consideration, the plaintiff could recover. It does not seem to have occurred to him that such a rule would tend to legalize contracts for prostitution, or that the principle in view is never applied to a contract tainted with immorality. Courts of justice will not aid the illicit or corrupt arrangement, or sift one part of it to save the other part."

Barumont v. Reeve, 8 Ad. & El. (N. S.) 483, was assumpsit on a promise, to pay a yearly sum to a woman for her maintenance, in consideration of her seduction by the defendant, of the past illicit intercourse between the parties, of the discontinuance thereof by agreement, and of the injury to the plaintiff. *Held*, not maintainable. This was on the ground that the moral consideration cannot support assumpsit.

See *Hook v. Pratt*, 78 N. Y. 371; s. c., 34 Am. Rep. 539.

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(54 Cal. 151.)

Criminal law — evidence — flight.

In a criminal case no legal presumption of guilt arises from the flight of the accused, but it is a circumstance for the consideration of the jury.

CONVICTION of murder. The opinion states the facts.

Lyman J. Mowry, for appellant.

A. L. Hart, attorney-general, and *D. J. Murphy*, for respondent.

MORRISON, C. J. The defendant was convicted in the court below of the crime of murder in the first degree, for the felonious killing, with premeditation and malice aforethought, of one Wong Ah Sun, and having been adjudged to suffer death, brings this appeal from the judgment, and also from an order denying his motion for a new trial.

The homicide was committed in the city and county of San Francisco; and on the trial it was shown in behalf of the prosecution that the defendant fled from said city and county to a remote part of the State immediately after the murder was perpetrated. The court below, charging the jury on the question of flight, used the following language:

"The flight of a person immediately after the commission of a crime, or after a crime is committed with which he is charged, is a circumstance in establishing his guilt, not sufficient of itself to establish his guilt, but a circumstance which the jury may consider

in determining the probabilities for or against him — the probability of his guilt or innocence. The weight to which that circumstance is entitled is a matter for the jury to determine in connection with all the facts called out in the case. I will read to you what has been said on that subject, from Wharton's Criminal Law:

“‘A presumption arising from attempts to escape or evade justice. Such an attempt, if shown, amounts to a strong presumption of guilt.’

“‘It is admissible for the prosecution to prove that the prisoner advised an accomplice to break jail and escape, or that he offered a bribe to one of his guards, or that he killed an officer of justice when making such an attempt. Evidence of an attempt to bribe or intimidate witnesses gives rise to the same presumption. So with flight, to which no proper motives can be assigned, and with the act of disguise, concealment of person, family, or goods, and many other *ex post facto* indications of mental emotion. By the common law flight was considered so strong a presumption of guilt, that in cases of treason and felony it carried the forfeiture of the party's goods, whether he was found guilty or acquitted.’”

It will be seen from the foregoing extract from the charge to the jury that the court below made the flight of the defendant strong presumptive evidence of his guilt. It is true that in other parts of the charge, the jury was told that flight was a circumstance entitled to greater or less weight, and in many cases, to no weight whatever; of all of which the jury was to judge.

In the first place, let us inquire into the correctness of that portion of the charge which construes flight into a presumption of guilt. Was not that part of the charge in violation of the provision of law which gives to the jury the exclusive right to judge of the facts, and prohibits the court from charging the jury on questions of fact? The correctness of the doctrine laid down by Mr. Wharton is not denied in its application to the Federal courts and the courts of other States, where the right exists to charge upon questions of fact; but it is claimed, on behalf of the defense, that it is not law under our system of practice.

“‘It is well settled, that the flight of a person suspected of crime is a circumstance to be weighed by the jury, as tending, in some degree, to prove a consciousness of guilt, and is entitled to more or less weight, according to the circumstances of the particular case. Such evidence is received, not as a part of the *res gestæ* of the

criminal act itself, but as indicative of a guilty mind." Roscoe Cr. Ev. 18; *People v. Stanley*, 47 Cal. 113.

But the vice in the charge consists in the fact that the court instructed the jury, that a presumption of guilt arose from the fact of flight. In the case of *People v. Walden*, 51 Cal. 588, the court uses the following language :

"The court below charged the jury, that the possession by the defendant of the key, unexplained, raises a reasonable presumption that he had it for the purposes shown by the evidence it could be used for ; or, in other words, if you believe it would open the clerk's office, where these ballots were kept, then the possession by the defendant, unexplained, raises a reasonable presumption that he had it for the purpose of opening that door." The court proceed to say : "In no view can this charge be sustained. If it be said that it was an attempt to charge in respect to a legal presumption, it was clearly error, since no such presumption would arise from the fact stated, as a matter of law. If it was an attempt on the part of the court to instruct the jury that the existence of one fact, in view of the ordinary experience of mankind and connection of events, must be presumed from the existence of another, this was an interference with what, as we have shown, is the exclusive province of the jury. It was charging the jury, 'with respect to matters of fact,' and was a contravention of § 18, art. 6, of the Constitution of the State."

But it is claimed, on behalf of the prosecution, that the charge, as a whole, is correct; and therefore the judgment should stand. There is no doubt that in one part of the charge the law on this subject (flight) was correctly given to the jury ; but the charge was contradictory, and that which was bad cannot be aided by that which was good. The case of *People v. Valencia*, 43 Cal. 552, is in point. There the court say : "It is not doubted that that part of the charge is erroneous, as it omits from the definition of murder in the first degree the essential qualities of deliberation and premeditation ; but it is contended by the prosecution, that the court had correctly defined murder in the first degree, and as the jury would consider together all the parts or propositions of the charge, the error in the part above cited is cured by the correct definition which had already been given. The two parts of the charge are contradictory, and the jury would not be able to say that the court intended that the former, rather than the latter, should be

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received by them as the correct definition of murder in the first degree."

It is unnecessary to pass upon the other errors assigned, as the one already noticed calls for a reversal of the judgment.

Judgment and order reversed, and cause remanded for a new trial.

Judgment reversed.

THORNTON, MCKINSTREY, ROSS, MYRICK, MCKEE and SHARPSTEIN, JJ., concurred.

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(54 Cal. 155.)

Insurance—fire—warranty against overvaluation—false swearing.

An insurance warranty against overvaluation is broken only in case of an intentional overvaluation; and a provision that fraud or false swearing shall work a forfeiture means intentional false swearing. (*See note, p. 74.*)

ACTION on a policy of fire insurance. The opinion states the facts. The plaintiff had judgment below.

J. W. Winans, for appellant. The application by plaintiffs for the insurance of the stock was an overvaluation, and vitiates the policy. By an express provision, the amount or value of the property insured, stated in the application, is made a warranty; and whether fraudulent or not, binds the assured; and if the value is overstated, the policy is void. *Levy v. Bailey*, 7 Bing. 349; a. c., 20 E. C. L. 157; *Clark v. Phoenix Fire Ins. Co.*, 36 Cal. 176; *Moadinger v. Mechanics' Co. of W. N.*, 2 Hall, 400; *Franklin Ins. Co. v. Culver*, 6 Ind. 137; *Moore v. Protection Ins. Co.*, 29 Me. 94; *May on Ins.*, § 477. The burden was on the plaintiffs to establish that the discrepancy was the result of error, and not of intention to defraud; and in the absence of satisfactory explanation, fraud must be presumed. *Marcheseau v. Merchants' Fire Ins. Co.*, 1 Rob. (La.) 442; *Hoffman v. Western Marine Fire Ins. Co.*, 1 La. Ann. 216; *Regnier v. La. State Fire Ins. Co.*, 12 La. 336; *Parker v. Phoenix Ins. Co.*, 19 Up. Can. 122.

Paul Newman and D. Freidenrich, for respondent.

MCKINSTRY, J. The fourth clause of the policy contains the following: "The application or survey, upon which the issuance of a policy is predicated, shall be considered a part of it, and a warranty by the assured. If the assured, in a written or verbal application for insurance, or by survey, plan, or description, or otherwise, makes any erroneous representation, or omits to make known any fact material to the risk, or overvalues the property, * * * then, and in every such case, this policy shall be void."

And the eighth clause provides: "Persons sustaining loss or damage by fire shall forthwith give notice of said loss to this company, and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon, also the actual cash value of the property. * * * The assured shall, if required, submit to an examination or examinations, under oath, by any person appointed by the company, and subscribe to such examinations when reduced to writing; and also shall produce their books of accounts and other vouchers, and exhibit the same for examination at the office of the company, and permit extracts and copies thereof to be made. The assured shall also produce certified copies of all bills and invoices, the originals of which have been lost. * * * All fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on the company under this policy."

It is claimed by appellant, that inasmuch as there was a discrepancy of five hundred dollars between the sum named in the "application" and the verdict, the burden of proof was cast upon the plaintiffs to establish that the statement in the application was not intentionally false. But under our system, *fraud* is ordinarily a question of fact, and the court is not authorized, except where by statute a *legal presumption* is created, to instruct a jury that the existence of one fact is to be *inferred* from the existence of another. *People v. Walden*, 51 Cal. 588; *Stone v. Geyser Co.*, 52 id. 315; *People v. Carrillo*, 54 id. 63. The jury may not have believed that the application was intentionally false, even in the absence of explanatory evidence.

The same is true in reference to the difference between the statements of the assured (sworn or unsworn), made after the fire, and

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the verdict. It may indeed be true that if the discrepancy, *in view of all the circumstances*, is so great as to convey the conviction of fraud to the reasonable mind, the jury should find fraud, as they should find in accordance with the fact in respect to every other subject, and in a plain case of a finding against evidence the trial court should grant a new trial. But it must be apparent that the effects of such discrepancies must vary innumera- bly, reference being had in each case to the circumstances under which the statement is made by the assured, its greater or less positiveness, and the consideration whether the verdict itself is in the particular instance to be treated as based upon positive data, or as an estimate only, approximating exact justice. So complicated a question is one peculiarly for the jury, the determination of which by that body can only be set aside when the court is clearly convinced, after full consideration of all the incidents made to appear at the trial, that the verdict is wrong.

The court below properly instructed the jury that the "false swearing" constituting fraud within the meaning of the policy was willful or intentional false swearing, "not a mere discrepancy or innocent error." It cannot be maintained that the mere discrepancy (supposing it to exist) creates a presumption, as matter of law, that the insured contemplated fraud when his statements were made.

[Omitting matters of fact.]

Judgment and order affirmed.

Ross and McKee, JJ., concurred.

NOTE BY THE REPORTER. — That overvaluation, to vitiate a policy when a mere representation, must be intentional, is held in *Fuller v. Boston Mut. F. Ins. Co.*, 4 Metc. 206; *Field v. Ins. Co. of N. A.*, 6 Biss. (N. S.) 121; *Stewart v. Phoenix F. Ins. Co.*, 5 Hun. 261; *Laidlaw v. Liverpool and London Ins. Co.*, 13 Grant Ch. 377; *Cox v. Aetna Ins. Co.*, 29 Ind. 586; *Bonham v. Iowa, etc., Ins. Co.*, 25 Iowa, 328; *Ritch v. Niagara, etc., Ins. Co.*, 21 U. C. (C. P.) 464; *Williams v. Phoenix F. Ins. Co.*, 67 Penn. St. 373; *Am. Ins. Co. v. Gilbert*, 27 Mich. 429; *Park v. Lyeoming Ins. Co.*, 79 Ind. 403.

Mr. Wood (Fire Ins. 5220) states the rule as to misrepresentations of value: "It must either be shown that the insured knew that it was worth less, or the actual value of the property must be so much less than that stated as to warrant a presumption that the error was intentional, and the burden is on the insurer to show the fraud."

So in *Wall v. Howard Ins. Co.*, 51 Me. 32, where the valuation of the insured was \$2,400, and the jury found the value \$1,040, the insurer was held released; and in *Cutron v. Tenn. Ins. Co.*, 6 Humph. 176, a valuation of \$12,000 by the insured, the actual value being \$8,000, was held as matter of law a fraudulent over valuation; and so in *Phoenix Ins. Co. v. Monday*, 5 Cold. 547, where the loss was stated at \$15,989.18, and the jury found it \$12,043; and in *Protection Ins. Co. v. Hall*, where the valuation was \$4,500 and the real value from \$6,000 to \$2,600.

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But in *Moore v. Protection Ins. Co.*, 27 Me. 47, it was held that where the plaintiff swore in his proofs that the value of the goods consumed was \$2,800, and the jury found it \$1,853, there was no evidence of false swearing to justify setting aside the verdict. To same effect, *Wolf v. Goodhue F. Ins. Co.*, 43 Barb. 400, where the loss was stated at \$3,041.38, and the verdict was \$412.27; *Gerhauser v. N. B. Ins. Co.*, 7 Nev. 174, valuation \$6,000, verdict \$3,000; *Enger v. People's F. Ins. Co.*, 4 Daly, 96, valuation \$9,989.03, verdict \$6,500; *Marchessault v. Merchants' Ins. Co.*, 1 Rob. (La.) 438, valuation \$15,549, verdict \$8,000; *Planters' Ins. Co. v. Deford*, 38 Md. 382, an excessive estimate of 398 hides in 3,159.

In *Williams v. Phoenix Fire Ins. Co.*, 61 Mo. 67, the total insurance was \$2,500, and the verdict was for \$1,902. The court said the question was for the jury, and that "the discrepancy, between the value of the goods as found by the jury, and the amount insured, is not so great as to make it absolutely incredible that the overvaluation, and the over estimate in the proofs of loss, may have occurred without positive dishonesty or fraudulent intent on the part of the plaintiff. The owner of goods may fairly be expected to set a higher value on them than anybody else would, and whatever might be the suspicions excited by a perusal of the testimony here, we cannot say that it is demonstrated that the jury erred in relieving the plaintiff from the imputation of fraudulent intent."

In *National Bank v. Ins. Co.*, 65 U. S. 673, it was held that a representation, not amounting to a warranty, of the value of the property insured, although an overvaluation, will not vitiate the policy unless it appears that it was intentionally excessive. The valuation was \$30,000; the value as found by the trial court was \$20,000. That court also found that there was no fraudulent intention on the part of the insured. The main question discussed was whether there was a warranty, but the court made the following observations which are applicable to the present question: "It will be observed, from an examination of the questions propounded to the assured, that among other things he was asked whether the building was of stone, brick, or wood; how the premises were warmed; what materials were used for lighting them; whether a watchman was kept during the night; what amount of insurance was already on the property; whether it was mortgaged, etc. These and similar questions refer to questions of which the assured had actual knowledge, or about which he might with propriety be required to speak with perfect accuracy. They are matters capable of precise ascertainment, and in no sense depending upon estimate, opinion, or mere probability. But his situation or duty were wholly different when required to state the cash value of his property. He was required to give its 'estimated value.' His answers concerning such value were in one sense, and perhaps in every just sense, only the expression of an opinion. The ordinary test of the value of property is the price it will command in the market if offered for sale. But that test cannot, in the very nature of the case, be applied at the time application is made for insurance. Men may honestly differ about the value of property, or as to what it will bring in the market; and such differences are often very marked among those whose especial business it is to buy and sell property of all kinds. The assured could do no more than estimate such value; and that it seems was all he was required to do in his case. His duty was to deal fairly with the company in making such estimate. The special finding shows that he discharged that duty and observed in good faith." The court declined to pass on the question whether a warranty covered only "matters of which the assured had, or should be presumed to have had, distinct, definite knowledge, and not such matters as values, which depend upon mere opinion or probabilities."

Mr. Wood says (*Fire Ins.* 428, note 3), that "it has been held, however, that a false statement of the cash value of property upon which insurance was asked, although not fraudulent, would avoid a policy." The cases which he cites to this, however, do not sustain the statement, and he undoubtedly states the true doctrine in the text, as follows: "But whatever may be the number of decisions, holding the one way or the other, there can be no doubt, that in conformity with the ordinary rules of construction applied to insurance contracts, and the ordinary principles of justice and fair dealing upon which they are supposed to be predicated, a policy cannot be held void for the breach of such a condition, unless the overvaluation is intentional and fraudulent, and not a fair expression of the honest judgment of the insurer, and the fact that the property is considerably overvalued does not of itself establish such fraud upon the part of the assured as avoids the policy."

That false swearing, to vitiate the policy, must be intentional and material, is held in

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Marion v. Great Rep. Ins. Co., 35 Mo. 148; *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 350; *Ins. Co. v. Weides*, 14 Wall. 375; *Moodinger v. Mechanics' F. Ins. Co.*, 3 Hall, 496; *Franklin Ins. Co. v. Culver*, 6 Ind. 187; *Israel v. Teutonia Ins. Co.*, 28 La. Ann. 689.

In *Dogge v. Northwestern Nat. Ins. Co.*, 49 Wis. 501, there was no specific provision in the policy against overvaluation, but the policy provided that any claim under it should be forfeited by an attempt at fraud by false swearing, etc. The total amount of insurance was \$1,150; the plaintiff, in his proofs of loss, under oath, stated the value of the property at over \$5,000; and the referee found its value to be \$3,000, but also found that plaintiff did not knowingly, willfully and for the purpose of defrauding defendant, swear to a false statement of the value, but grossly exaggerated its value and quantity in consequence of his imperfect knowledge of the English language, while acting under the direction of the person who aided him in making the proofs. Held, that upon these findings plaintiff was not precluded, upon the ground of fraud, from recovering. The court said: "Under these circumstances, if the plaintiff did honestly, or without any fraudulent intent, place an extravagant valuation upon the property, it would not prevent a recovery upon the policy. *Parker v. Amazon Ins. Co.*, 34 Wis. 364; *Ins. Co. v. Weides*, 14 Wall. 375; *Williams v. Phoenix F. Ins. Co.*, 61 Me. 67; *Moore v. Protection Ins. Co.*, 29 id. 97; *Franklin F. Ins. Co. v. Updegraff*, 43 Penn. St. 350; *Marion v. Great Republic Ins. Co. of St. Louis*, 35 Mo. 148; *Wolf v. Goodhue F. Ins. Co.*, 43 Barb. 400. Nothing is more common in the affairs of life than for men to overvalue their property; and when, as the referee finds in this case, it is not done with any fraudulent purpose, it should not avoid the policy. 'It is only fraudulent false swearing in furnishing the preliminary proofs, or in the examinations which the insurers have a right to require, that avoids the policies.' 14 Wall. 163. The discrepancy between the value of the property as found by the referee, and as stated by the plaintiff in his proofs of loss, is not so great as to warrant a court in assuming that the over valuation was made with a fraudulent intent, or for the purpose of obtaining some undue advantage over the company."

In *Leach v. Republic Fire Ins. Co.*, 58 N. H., it was held that an overvaluation of property destroyed, made under oath by the assured and through carelessness and inattention to the subject, but which by due attention could not have been honestly made, though not to defraud the company, is a ground of forfeiture, for fraud and false swearing, of all claim under the policy. Such a representation is fraudulent. *Kerr on Fraud and Mist.* 54, 55; *Stone v. Denny*, 4 Metc. 151; *Harding v. Randall*, 15 Me. 333. Although there was no positive intent to defraud the defendants, the false estimate was designed for the defendants to act upon as true, and tended to produce the same mischief that would result from actual and willful falsehood. Ignorance of what the plaintiff was bound to know was not innocence, and gross negligence in a matter so grave was a positive wrong. 2 Pars. on Cont. 785. In an overvaluation, grossly out of proportion to the actual value of the property, the plaintiff is not entitled to immunity from the charge of fraud. *Wall v. Howard Ins. Co.*, 51 Me. 32.

In *Bobbitt v. Liverpool, etc., Ins. Co.*, 66 N. C. 70, there was a warranty that the cash value was \$30,000, and the insurance was for \$20,000. It was held substantially that the warranty was broken if the cash value was not as stated, although not fraudulently misstated.

In *Boutelle v. Westchester Fire Ins. Co.*, 51 Vt. 4; s. c., 31 Am. Rep. 606, it was held that a policy of fire insurance conditioned to be void for overvaluation is avoided by any substantial overvaluation whether fraudulent or innocent. The cases cited in the opinion are not in point, except two, and these are cited above.

WILLIAMS V. HARTFORD INSURANCE COMPANY.

(84 Cal 443.)

Insurance—fire—total loss of building.

In case of fire insurance upon a building, if the building loses its identity and specific character by fire, although a large part of the walls and some of the iron attached thereto are left standing, it is a "total destruction" within the meaning of the policy.

ACTION on a policy of fire insurance. The opinion states the facts. The plaintiff had judgment below.

Gray & Haven, for appellant.

G. W. Gordon and John Garber, for respondent.

ROSS, J. This is an action upon a policy of fire insurance upon the plaintiff's undivided half interest in a brick building situated in Virginia City, Nevada. The plaintiff recovered a verdict for four thousand five hundred dollars. Defendant moved for a new trial, which was denied, and brings this appeal from the judgment and the order refusing a new trial.

The policy contained, among other clauses, the following: "Damage to property not totally destroyed, unless the amount of said damage is agreed upon between the assured, and the company shall be appraised by disinterested and competent persons mutually agreed upon by the parties; when personal property is damaged, the assured shall put it in the best order possible, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised, and the detailed report of the appraisers in writing, under oath, shall form a part of the proofs hereby required, each party paying one-half the expenses of the appraisals; and until such proof and certificates are produced, and examination and appraisal permitted, the loss shall not be payable. And the company reserves the right to take any part or all of the property appraised, paying market value therefor, in case the damage as appraised is deemed excessive."

The main contest between the parties at the trial in the court

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below was whether a total or only a partial destruction of the building had resulted from the fire; the defendant contending that the destruction had been partial only.

[Omitting other considerations.]

Upon the question of the extent of the loss, the plaintiff Williams testified as follows: "The building was entirely burned out. It had every appearance of being a fire of great heat. Portions of the old wall were standing — that is, in position; they were all cracked and warped; wherever joists had been in, they were badly torn out, apparently from the falling of the joists. It was so perfect a destruction, that I, as well as the architect who examined it with me, placed it as a total destruction, that was perfectly worthless as a building; in my own mind I deemed the building worthless. That which was left standing would just amount to debris. It was a wall which was unfit for use with any safety, I thought we would have to tear it down to make a new wall. It would have to be torn down and replaced; that is, another wall built in its place. I have been an extensive builder. * * * The shutters were warped and blistered, and injured to such an extent that I considered them perfectly worthless for any purpose, even as old iron, unless you might get some of the bands on the wrought iron portion. The balance of the iron-work — the pillars, for example, they were all warped so much that while you might use them, you could not use them to make a perfect wall as it was before; hence, I class that simply as old iron." The witness further testified, that after the fire he sold his interest in the ground upon which the building had been erected to one Douglass, and told him, so far as the old debris was concerned, he could take it, that he did not care any thing about it. There was some testimony given conflicting with that of Williams, already stated, and some given in support of it. The evidence was also conflicting upon the question of the value of the property destroyed. There was no conflict, however, in the evidence as to the fact that after Douglass purchased, he rebuilt, and in doing so used some of the remnants of the old building. At the request of defendant, the court below submitted to the jury the following special issue: "Was the building insured by the defendant totally destroyed?" to which they answered in the affirmative. This finding will conclude the defendant unless the jury was erroneously instructed upon the question. The charge of the court was lengthy, but the gist of it upon this proposition

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is embodied in the following extract: "A total loss does not mean an absolute extinction. The question is not whether all the parts and materials composing the building are absolutely or physically destroyed, but whether, after the fire, the thing insured still exists as a building. Although you may find the fact that after the fire a large portion of the four walls were left standing, and some of the iron-work still attached thereto, still if you find that the fact is that the building has lost its identity and specific character as a building, you may find that the property was totally destroyed within the meaning of the policy."

We think there was no error in the instruction. In *Nave v. Home Mutual Insurance Company*, 37 Mo. 430, it was held that a policy of insurance upon the building is an insurance upon the building as such, and not upon the material of which it is composed. See also *Huck v. Globe Insurance Company*, 127 Mass. 306; s. c., 34 Am. Rep. 376.

In *Insurance Company v. Fogarty*, 19 Wall. 644, which was an action on a policy of marine insurance, the Supreme Court of the United States held that the doctrine of an absolute extinction of the thing insured is not the true doctrine, even in that class of cases where the rule is stricter than in cases like the present. In the course of the opinion, in speaking of the case of *Hugg v. Augusta Insurance Company*, 7 How. 595, where there was an insurance of jerked beef of four hundred tons, part of which was thrown into the sea and part of the remainder so seriously damaged that the authorities of the city of Nassau refused to allow more than one hundred and fifty tons of it to be landed, the court say: "It will be observed that in this case, as in the case of *Marcadier v. Chesapeake Insurance Company*, 8 Cr. 47, the destruction spoken of is destruction as to species, and not mere physical extinction. Indeed, philosophically speaking, there can be no such thing as absolute extinction. That of which the thing insured was composed must remain in its parts, though destroyed as to its specific identity. In the case of the jerked beef, for instance, it might remain as a viscid mass of putrid flesh, but it would no longer be either beef or jerked beef. * * * The case of *Judah v. Randal*, 2 Cai. Cas. 324, where a carriage was insured and all was lost but the wheels is another illustration of the principle. A part of the carriage, namely, the wheels, a very important part, was saved; but the court held that

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the thing insured, to wit, the carriage, was lost — that it was a total loss. Its specific character as a carriage was gone.”

We discover no error in the record entitling defendant to a new trial.

Judgment and order affirmed.

Judgment affirmed.

McKINSTRY, and McKEE, JJ., concurred.

PAYNE V. ELLIOT.

(84 Cal. 332.)

Action — for conversion of shares of stock.

An action lies for conversion of “shares of stock,” rather than for the certificate.*

TROVER. The opinion states the case. The plaintiff had judgment below.

J. M. Seawell, for appellants.

L. Quint, for respondent.

McKEE, J. This is an action of trover. The plaintiff seeks to charge defendants with \$2,796.32 and costs, for an alleged conversion of one hundred shares of the stock of the “Northern Belle Mill and Mining Company,” and also to have them adjudged guilty of fraud. The complaint was demurred to on several grounds, and the demurrer overruled. Defendants afterward answered, and upon a trial had in the absence of defendants and their attorneys, the court gave judgment for the plaintiff for the amount sued for, in gold coin, and also adjudged that the defendants were guilty of fraud. The appeal comes to this court upon the judgment roll, and the appellants claim that the lower court erred in overruling defendants’ demurrer to the complaint, upon the grounds that

* See *Somerby v. Buntin* (118 Mass. 279), 19 Am. Rep. 459. In *Boardman v. Cutter*, 139 Mass. 383, it was held that shares of stock are goods, wares and merchandise within the statute of frauds.

there is no allegation that the plaintiff owned, or that the defendants converted, any *certificates* of shares of stock; and that the allegation of fraud is insufficient to sustain the judgment that the defendants were guilty of fraud in the supposed conversion. The principal question is, whether shares of stock, *eo nomine*, are property for which an action, in the nature of an action of trover, can be maintained.

At common law, trover was the proper remedy for a conversion of personal property; but it lay only for tangible property, capable of being identified and taken into actual possession. The conversion of the property was the gist of the action; and the action did not lie, unless the defendant had become actually possessed of the property by some means, whether of finding or otherwise. Shares of stock and such things did not belong to that class of property known as chattels; they were considered incorporeal, intangible things, which existed in idea, and were incapable of being subjected to actual possession. Nor were they supposed to denote possession; for they had no other evidence of an existence than the certificate which was issued to the person who claimed the right to what the certificate represented. That right consists of the privilege of voting in the concerns of the corporation, and of participating in the profits of the business of the corporation. It subsisted only in law or contract. It was a right to a thing not in possession, but in action. The certificates themselves were not considered property, but were considered evidence of property. Wherever common-law ideas of personal property prevail, courts hold that trover is not the proper remedy for the conversion of things which were considered at common law as mere personal rights, not reducible into possession, but recoverable by law. So, the Supreme Court of Pennsylvania has held that trover will not lie to recover damages for shares of bank stock; and says Justice SHARSWOOD, "the principle applies to all other corporation stocks." A share of stock, says the court, "is an incorporated, intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation—with the right to receive in the meantime, such profits as may be made and declared in the shape of dividends. Trover can no more be maintained for a share in the capital stock of a corporation than it can for the interest of a partner in a commercial firm." *Neiler v. Kelly*, 69 Penn. 407.

Upon the idea that shares of stock cannot be taken away or wrongfully detained from the owner or that they cannot be lost by the owner or found by a stranger, there is no doubt of the soundness of that decision. But the fiction on which the action of trover was founded, namely, that a defendant had found the property of another, which was lost, has become, in the progress of law, an unmeaning thing, which has been by most courts discarded; so that the action no longer exists as it did at common law, but has been developed into a remedy for the conversion of every species of personal property. It lies for bank notes sealed in a letter (*Moody v. Keener*, 7 Port. [Ala.] 218); for negotiable instruments (*Compere v. Burr*, 5 Blackf. 419); for a judgment (*Hudspeth v. Wilson*, 2 Dev. [N. C.] 372); for a promissory note which has been paid (*Pierce v. Gibson*, 9 Vt. 216); for copies of a creditor's account (*Fullam v. Cummings*, 16 id. 697); for a writ of execution issued on a judgment (*Keeler v. Fussett*, 21 id. 539); and for certificates of shares of stock (*Anderson v. Nicholas*, 28 N. Y. 600; *Atkins v. Gamble*, 42 Cal. 98; *Von Schmidt v. Bourn*, 60 id. 616).

At the same time that the action has been thus expanded, the words "things in action" have undergone such a development from their original meaning, that they now represent things to the imagination in the light of tangible objects; and as such, they are the subject of contract, sale, gift, mortgage, bailment, and pledge; and under the provisions of our Codes they are personal property, subject to taxation, attachment, execution, levy, and sale. §§ 542, 688, Code Civ. Proc.

It is therefore the "shares of stock" which constitute the property which belongs to the shareholder. Otherwise, the property would be in the certificate; but the certificate is only evidence of the property; and it is not the only evidence, for a transfer on the books of the corporation, without the issuance of a certificate, vests title in the shareholder; the certificate is therefore but additional evidence of title, and if trover is maintainable for the certificate, there is no valid reason why it is not also maintainable for the thing itself which the certificate represents. For, as the Supreme Court of Connecticut say, "If a certificate of stock is unlawfully retained when demanded, what is presumed to have been converted? The certificate has no intrinsic value disconnected from the stock it represents. No one would say that the paper alone had

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been converted — that the conversion of the paper constitutes the entire wrong. The real act done in such cases is precisely the same as that done here — no more, no less; and to say that trover will lie in one case and not in the other, is to make a distinction where in reality there is no difference.* * * The stock in both cases was converted; and we think that in these days, when the tendency of courts is to do away with technicalities not based upon reason, a technical distinction of this character should no longer be sustained." *Ayres v. French*, 41 Conn. 151. In *Boylan v. Hagnel*, 8 Nev. 352, and in *Kuhn v. McAllister*, 1 Utah, 275, actions of this character for "shares of stock" were sustained. It follows that the court below did not err in overruling the demurrer to the complaint, or in rendering judgment for the plaintiff for the value of the stock and interest thereon from the time of the conversion until the time of the trial.

[Omitting other matter.]

Judgment affirmed.

ESTATE OF TOOMES.

(54 Cal. 509.)

Witness—expert—sanity—Roman Catholic priest.

A Roman Catholic priest, regularly educated and officiating as such, and required by the duties of his office to pass his judgment upon the mental condition of invalids and dying persons, to the end that he may administer the sacraments only to those whose minds are in a proper state to reason or act of their own volition, is an expert as to the sanity of a person whom he so attends.

APPPEAL from probate. The opinion states the case.

Leonard Reynolds and *W. W. Cope*, for appellants.

H. A. Leake, *J. Chadbourne* and *Wilson & Wilson*, for respondent.

MORRISON, C. J. On the first day of August, 1877, a petition was filed in the Probate Court of the county of Alameda by certain

persons thereon named, for the revocation of the probate of the will of Mary Isabella Toomes, deceased, and for the cancellation of letters testamentary granted by said court upon such probate to one John S. Butler. The grounds set forth in said petition are: "1st, that said will was a forged instrument; 2d, that the said Mary Isabella Toomes was not at the date of said pretended will of sound disposing mind or memory, nor free from undue influence, but on the contrary, was of unsound mind, and incompetent by reason thereof to make a will; and further, that if said alleged will was ever made by her she never understood its contents, but was imposed upon and deceived, and that she executed the same under fear and undue influence; and 3d, that said purported will was never subscribed by said Mary Isabella Toomes herself in any manner, by mark or otherwise, nor was her name ever subscribed thereto in any manner, by mark or otherwise, in her presence or by her direction, by any person, nor did any person write his name to said purported will as an attesting witness to her mark or to her signature by mark."

To this petition an answer was duly filed containing a specific denial of all the material allegations contained in the petition, and the case having been duly heard and considered by the said Probate Court of Alameda county, a decree of said court was entered therein on the 26th day of June, 1878, denying the application of the contestants, and ratifying, approving and confirming the probate of the said will of the said Mary Isabella Toomes, and adjudging the said will to be in all respects legal and valid. In proper time petitioners filed their bill of exceptions, and now bring the action of the Probate Court before this court for review.

On the trial in the court below one Lawrence Serda was called as a witness in behalf of contestants, who on his examination in chief testified as follows: "I called there alone about three o'clock the day previous to her death. Afterward told Father Lagan. I went into the room and inquired about the state of her health. She didn't give me any answer, in fact she didn't seem to take much notice of me at all. I remained there a few minutes. In the same room there was a lady. She was afterward introduced to me as Mrs. Butler. As I could not get a proper answer from the old lady, I requested Mrs. Butler to move out of the room, which she did very kindly, and then I asked the old lady the questions preparing her for the confession. At first I spoke to her in Spanish,

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but she gave me an answer in English. I do not remember what her answers were."

Question by contestants: "Were her answers responsive to your questions? Objected to by proponents. Objection sustained and exception taken by contestants."

Witness was then further interrogated and testified as follows: "I was regularly educated for the priesthood at a university in Spain, and have officiated as a priest for the past ten years. That one of the objects of the preparatory education of a priest, as he was taught, was to make him competent to pass upon the mental condition of a communicant. That for that purpose, to a limited extent, physiology and psychology were branches of his studies. That previous to officiating as a priest it was requisite that he should be skilled in determining the mental condition of those who sought the sacraments; that in every case of the administration of the rites of his church to invalids or dying persons it was necessary for the priest to make an examination of the mental condition of the recipient, to ascertain if his mind was in a proper state to reason or act of its own volition. That the sacrament could only be administered after such a preliminary examination. That therefore as a priest he was daily required to exercise and pass his judgment on the mental condition of persons."

Question by contestants: "State the mental condition of Mrs. Toomes as she appeared to you during this visit?"

Question objected to on the ground that "the witness had not been shown to be an expert." The court sustained the objection, and the contestants excepted to the ruling of the court.

It is claimed on behalf of the appellants that this was error. Section 1870 of the Code of Civil Procedure reads as follows: "In conformity with the preceding provision, evidence may be given upon a trial of the following facts:

"Subdivision 9. The opinion of a witness respecting the identity or handwriting of a person when he has knowledge of the person or handwriting; *his opinion on a question of science, art or trade, when he is skilled therein.*"

"On questions of science, skill or trade, or others of the like kind, persons of skill, sometimes called *experts*, may not only testify to facts, but are permitted to give their opinions in evidence. Thus the opinions of medical men are constantly admitted as to the cause of disease or of death, or the consequences of wounds,

and as to the sane or insane state of a person's mind, as collected from a number of circumstances, and as to other subjects of professional skill; and such opinions are admissible as evidence, though the witness founds them not on his personal observation, but on the case itself, as proved by other witnesses on the trial." 1 Greenl. Ev., § 440.

The principle is thus stated by another writer on the law of evidence: "The opinions of witnesses possessing peculiar skill are admissible wherever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it. 2 Best on Ev., § 513.

It will thus be seen that the provision of the Code permitting a witness to give his opinion on a question of science, art, or trade, when skilled therein, is but a legislative enactment of a well-settled rule of evidence at common law; and the inquiry here is, whether it sufficiently appears that the witness Serda was an expert upon the question of mental disease, generally termed insanity.

It has been a question with the courts whether the rule upon this subject was limited to the opinions of experts; and in a very late and elaborate case before the Supreme Court of New Hampshire, it was held that it was not so limited. "Non-professional witnesses, who are not subscribing witnesses, to a will, may testify to their opinions in regard to the sanity of a testator, when founded upon their knowledge and observation of the testator's appearance and conduct." *Hardy v. Merrill*, 56 N. H. 227. And Mr. Redfield, in his work on Wills, seems to adopt the rule laid down in the New Hampshire case as correct. The following is his language: "The learned judge shows very conclusively, both upon authority and reason, that the opinion of the unprofessional witness in such a case is commonly far more reliable as a basis of ultimate decision on questions of sanity and mental capacity, than any specific facts which could possibly be gathered from the witnesses. * * *

The tendency of American courts in the last few years has been largely in the direction contended for by the learned judge; and there seems to be no question that it must ultimately prevail all but universally. We should rejoice at such a result as greatly tending toward the establishment of truth, with greater facility

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and certainty, in a very important class of cases." 1 Redf. on Wills (4th ed. 1876), 138, 145; *De Witt v. Barly*, 17 N. Y. 340.

It is not necessary for us, however, to pass upon the question of the admissibility of such evidence in this case. The witness Serda, it is claimed, was an expert, and it is upon the ground that he was an expert that the alleged error in the ruling of the court below is predicated. The inquiry then is, what is an expert? "Experts, it has been said, are persons instructed by experience." 2 Best on Ev. 368. Webster's definition is, "taught by use, practice, or experience." Worcester says an expert "is a person having skill, experience, or peculiar knowledge on certain subjects or in certain professions—a scientific witness." The following definition is given by Bouvier: "Experts—Witnesses who are admitted to testify from a peculiar knowledge of some art or science, a knowledge of which is requisite or of value in settling the point at issue; persons conversant with the subject-matter on questions of science, skill, trade, and others of like kind."

In the case of *Fairchild v. Bascomb*, 35 Vt. 408, the court says: "Persons who are much accustomed to attend upon the sick—to watch the progress of diseases to their end, and to be with the dying, are by their experience enabled to form a better judgment as to the course of disease, and its probable effect upon the body and mind in the last hours of life, than others who have no such opportunity. Physicians who are in general practice, and nurses, thus become experts in such matters, so far as observation and experience can furnish knowledge." "One who is not engaged in the practice of physic may, nevertheless, be competent to testify, if he shows that he had studied the science of medicine, and felt competent to express a medical opinion upon a particular disease. The fact that he was not a practicing physician would go to his credit." *Tullis v. Kidd*, 12 Ala. 648. "It has been decided often that medical experts may express a direct opinion upon the sanity of the testator, when they have had an opportunity to form such opinion from personal examination and acquaintance." 1 Redf. on Wills, 154.

The foregoing citations are sufficient to establish the general rule on the subject of "expert" testimony, and now let us apply the rule to the facts of this case.

Was the witness Serda an expert on the question of insanity? Was he skilled in the science of mental diseases? A reference to

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his evidence will answer these questions. He says he was regularly educated in a college of Spain, and had officiated as a priest for ten years. That it was a part of his preparatory education to become competent to pass upon the mental condition of communicants in his church, and for that purpose physiology and psychology were branches of his studies. "That previous to officiating as a priest, it was requisite that he should be skilled in determining the mental condition of those who sought the sacraments. That in every case of the administration of the rites of his church to invalids or dying persons, it was necessary for the priest to make an examination of the mental condition of the recipient, to ascertain if his mind was in a proper state to reason or act of its own volition. That the sacrament could only be administered after such a preliminary examination, and that therefore, as a priest, *he was daily required to exercise and pass his judgment on the mental condition of persons.*"

It has been shown by the authorities already referred to, that physicians in general practice, who have never made a specialty of the subject of insanity, as well as physicians who are not engaged in the practice of their profession, and also nurses, are deemed experts on this subject; and on what principle, or for what reason, could the witness Serda be held not to be an expert? It was a part of his collegiate education, and it was especially a matter of daily practice with him, for ten years, to familiarize himself with the mental condition of persons upon whom he was called on to attend in his character as a priest; and it does seem to us, that from both education and experience he was peculiarly qualified to express an opinion, as an expert, on the question of mental disease.

[Omitting other matters.]

Judgment reversed.

SHARPSTEIN, THORNTON and MYRIK, JJ., concurred.

CASES

IN THE

SUPREME COURT

OF

FLORIDA.

FRIEND V. DURYEE.

(17 Fla. 111.)

Partnership — non-commercial — negotiable instrument.

Attorneys-at-law, who were partners in the practice of their profession, have no authority to bind the firm by becoming parties to negotiable instruments, unless such authority is given by the terms of partnership, or expressly given or recognized by both, or may be implied from the general habits of the partners in their business transactions.*

ACTION on an acceptance. The opinion states the facts. The plaintiff had judgment below.

John Friend, in pro. per.

James M. Baker, for appellee.

RANDALL, C. J. Duryee, appellee, sued Friend & Hammond, as partners by that name, upon their indorsement of a bill drawn by

*To same effect, *Smith v. Sloan* (37 Wis. 935), 19 Am. Rep. 737; *Pooley v. Whitmore* (18 Meak. 333), 27 Am. Rep. 733.

the St. Mary's River Lumber Company upon G. D. Howell, of New Jersey, at sixty days' sight, payable to the order of Friend & Hammond, and accepted, before indorsement, by Howell. The declaration alleges that the bill was indorsed by "Friend & Hammond" to the plaintiff, was presented, when due, for payment, and duly protested for non-payment, and due notice thereof to defendants, etc., and defendants have not paid.

The defendant Friend pleads that himself and Hammond were not partners doing business in the firm name of Friend & Hammond in manner and to the effect alleged, but that the said Hammond and himself were partners only in the practice of law before the courts, and never were partners in trade or authorized to sign bills of exchange or otherwise to contract liabilities, which was well known to the plaintiff, and denies that he indorsed the bill or authorized the indorsement thereof for him.

And for a further plea on equitable grounds, the defendant Friend says that the draft on which the action is brought was not indorsed to the plaintiff as a usual commercial paper, but that plaintiff discounted and took the same from defendant Hammond at a large discount, and not for the usual rate of exchange, after it was accepted by Howell, the drawee, with the understanding that plaintiff would take, and only did take said paper on the responsibility of the acceptor, Howell, who was represented by the plaintiff to be a good and responsible party, and that Hammond merely indorsed said paper in blank as a transfer of the same for the accommodation of the plaintiff to enable him to collect the same from the acceptor, and with the further understanding that the plaintiff would look to Howell, and not to the defendants, or either of them, for payment of the draft, which the plaintiff in equity ought to do.

The defendant Hammond pleads severally that the plaintiff bought the draft at a large discount from him, Hammond, after he had procured the acceptance thereof by Howell, a member of the firm called the St. Mary's River Lumber Company (the drawer of the draft); that it was understood at the time plaintiff purchased the draft that plaintiff took it upon the known solvency of the acceptor, and that this defendant's indorsement was not for the purpose of guaranteeing the draft, but to enable plaintiff to collect the same from the acceptor, and simply to transfer the paper to the plaintiff.

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The plaintiff demurred to the several pleas :

First, Because the defendants ought not to file several pleas, but should be required to plead as partners by joint and not by several pleas.

Second, That the first plea of the defendant Friend is insufficient and tenders no material issue ; that it does not deny the indorsement of the draft by Friend & Hammond as partners, and traverses no material allegation in the declaration, and sets forth no defense to the action or an avoidance of the liability, and is evasive, double and uncertain, and not responsive to the declaration.

Third, That the said plea above pleaded by John Friend, and the pleas above pleaded by D. M. Hammond, are insufficient in law, further, in that they do not plead in denial of the indorsement of said draft, as partners, to the plaintiff for a valuable consideration.

Fourth, That said pleas do not set forth any matter or facts discharging or relieving them from liability as indorsers.

Fifth, That said pleas set forth no legal defense to said action, and are frivolous and insufficient.

The demurrer was sustained, the pleas adjudged to be insufficient, and leave granted to defendants to plead over. The defendants declined to plead anew, and the court gave judgment by default, impanelled a jury, who assessed the plaintiff's damages at one hundred and sixty-one $\frac{1}{4}$ dollars, for which judgment was rendered with costs.

From this judgment the appeal is taken. The errors assigned are :

1. That the court erred in holding the defendants to be partners in trade, and in requiring them to plead by a joint plea as partners.
 2. In sustaining the demurrer to the pleas.
 3. In disregarding and setting aside defendants' pleas which set up a good defense.
 4. In giving judgment by default for want of plea.
 5. In giving final judgment for plaintiff.
- [Omitting the consideration of the first assignment of error.]

The second ground of demurrer is, that the plea of Friend tenders no material issue, is evasive, double, uncertain and not responsive.

The plea of Friend denies that defendants were general partners, or partners in trade, but says they were only partners in the prac-

tice of a profession, that he did not sign or authorize the indorsement of the draft, and that plaintiff knew the character of the partnership.

The declaration is against defendants as copartners, upon their indorsement of a bill of exchange, and alleges merely a copartnership, without in express terms charging the purpose of the copartnership.

A partnership for the purpose of engaging in the practice of a profession is not a partnership *in trade*. By the custom of merchants, long established as law, if one partner *in trade* draw, accept or indorse a bill or note in the name and seemingly in behalf of the firm, such act will render all the partners liable to a *bona fide* holder. Chitty on Cont. 45. The partnership must be in a *trade* or concern to which the issuing or transfer of bills is necessary or usual, for otherwise a copartner will not be liable for the act of his partner, unless he gave express authority. Chitty on Cont. 54, and notes. Attorneys who are in partnership have no implied authority to become parties to negotiable instruments and bind the firm thereby. The authority to do such acts must in such cases be either expressly given, or be recognized as proper and necessary, or in the usual course of a particular business of that firm. Story on Part., § 102; *Sweetser v. French*, 2 Cush. 310; *Harman v. Johnson*, 18 L. & E. Rep. 400; Pars. Merc. Law, 175; *Lanier v. McCabe*, 2 Fla. 32; *Bank of Rochester v. Bowen*, 7 Wend. 158; *Breckinridge v. Shrieve*, 4 Dana, 375.

The rule is thus given in 4th Dana: Borrowing money is not part of the regular business of an attorney and counsellor at law; from the existence of a partnership in that profession, therefore, no authority results to any member of the firm to obtain loans on the credit of the firm, unless authority is given by the express terms of the partnership contract, or may be implied from the general habits of the partners, and no other member will be bound by such contract without his express consent. We find no exceptions to this rule in the books. The declaration in this case does not allege the character of the partnership of Friend & Hammond, whether in trade or otherwise. By implication only can we consider it as charging that the draft was indorsed in the regular course of the business of the firm, and thus that it contains a cause of action. The first plea puts in issue this implied allegation, and as we have seen, tenders a substantial issue and a defense. If true,

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it shows that Friend is not liable. The judgment is therefore erroneous, as to the second ground of demurrer.

[Omitting other errors.]

These authorities would seem to be conclusive that the facts pleaded constitute a defense to the action, and that the demurrer should have been overruled.

It is unnecessary to notice any other question raised by the assignment of errors, as the judgment must be reversed with directions to enter judgment overruling the demurrer, and that such further pleadings and proceedings may be had as may be according to law.

YOUNG V. THOMAS.

(17 Fla. 100.)

Taxation — license tax on lawyers.

The legislature has the power to levy a license or occupational tax upon lawyers.

BILL to restrain collection of a tax. The opinion states the point. The court below dismissed the bill.

H. B. Thrasher, King and Taylor, for appellant.

Attorney-General, for appellee.

WESTCOTT, J. In the absence of a petition of appeal in this case, we must look for the grounds upon which a reversal is sought to the bill filed. If it states distinctly the grounds upon which the equity sought to be enforced is claimed to exist, and properly presents the questions involved as arising out of the facts stated, no injustice can be done in treating the question as there presented by the plaintiff.

No question as to whether the matter presented is the subject of equitable jurisdiction is raised by either party. The question presented by the case as stated is, has the legislature the power to tax the pursuit, the avocation of a "lawyer," notwithstanding his previous admission to practice in the several courts of this State under the statutes of this State regulating that subject.

The appellant claims that such a tax is unconstitutional, and in derogation of his vested rights as an attorney.

The solution of this question involves the consideration of two general subjects:

First. The nature and extent of the power of taxation, it being clear that the power to tax, in so far as it exists, is in the legislative department of the government.

Second. Is the avocation of an attorney a pursuit or business the following of which may be made the subject of a special license tax in this State? Is the imposition of such tax within the power of the legislative department of the government of this State as properly defined? The power to tax is legislative in its character. It in no sense belongs to either the executive or judicial departments of the government. This power in the legislature is unrestricted, except where it meets an organic limitation; such limitation must be found either in the Constitution of the United States or of this State, and must be by virtue of an express limitation to that effect, or must be clearly and plainly implied from some provision of the Federal or State Constitution.

The power to tax is one of the essential elements of sovereignty, much more essential, if such a comparison can be made, than the power to punish crime, to regulate descents, or other like admitted subjects of legislative action.

Chief Justice MARSHALL says this power is an incident of sovereignty, that it is co-extensive with that to which it is incident; that all subjects over which the sovereign power of a State extends are objects of it, and that the only security against its abuse is the power of the constituents upon whom it acts. 4 Wheat. 428-9.

Thus disposing of this question, for we see no necessity for saying more in reference to it, we reach the only remaining question involved in the case. That question is: Is the avocation of an attorney a pursuit or business, the following of which may be made the subject of a special license tax in this State. Is there any such limitation upon the general power of taxation vested in the legislature as prohibits such legislative action?

The only provisions relating specially to taxation, under which we conceive a claim of exemption can be founded, are sections 1 and 6 of article 12.

Section 1 of article 12, is as follow:

“The legislature shall provide for a uniform and equal rate of

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taxation, and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes." Section 6, after limiting the purposes for which counties and towns may levy a tax, and prescribing the rule of taxation, authorizes the legislature to provide for levying a special capitation tax and "tax on licenses."

The limitations contained in the first section do not refer to the occupation or business of an attorney. The uniform ruling of the courts, so far as we have been able to ascertain, is that the term property as used in this section does not include a business calling or occupation as distinct from the property or capital employed in it. 49 Ga. 200; 42 id. 596. We presume no claim of a serious character will be made to exemption under the limitations of this clause, and we therefore proceed to the consideration of the clause in section six. Construing that clause literally, its effect would be to authorize the levying of a tax upon licenses granted, and if an attorney belongs to a class who exercises his avocation under and by virtue of a license, his occupation would be included within its terms. This however we do not think is the proper construction. License fees or amounts required to be paid to follow any particular employment are levied for two purposes, viz.: for revenue, and as a means of controlling or limiting the exercise of some particular avocation, in other words, as a police regulation. We think the purpose of the framers of the Constitution was by this clause to vest in the legislature, by a specific and express grant, independent of or in addition to its general power to tax, the power to tax any avocation or business by way of requiring a license tax for its exercise. So far as this clause is concerned, we think the legislature unrestricted in its power to tax by way of license fees, and that it may so tax either as a police regulation to restrain any particular pursuit or for the purposes of revenue.

The plaintiff in this case insists in his bill that the levy of this tax is in derogation of his vested rights as an attorney.

In the language of the Court of Appeals of Virginia, *Ould v City of Richmond*, 23 Grat. 469-470; s. c., 14 Am. Rep. 139, "a lawyer's license authorizes him to practice law in any court of the Commonwealth. It is a vested civil right, yet it is as properly a legitimate subject of taxation as property to which a man has a vested right. I cannot perceive that there would not be as much

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reason for saying that a man's property was not taxable because he has a vested right to it, as for saying that a lawyer's license is not taxable because he has a vested right to it."

The matter of regulating the admission of persons to practice law is the subject of legislative action and control. At common law the courts had no power to admit attorneys or counsellors. 12 Fla. 281. Their duties are of such character that in order to secure proper qualification for their discharge the legislature imposes the duty of examination and determination upon the courts. The only difference between this pursuit and that of any other for which a license is not required is, that a qualification looking to competency is required in one, and the right independent of qualification is in the other. Because the law prescribes certain methods by which the existence of the qualification to follow a pursuit is determined, and after determining their existence a general authority to follow such pursuit is granted, gives no greater right to follow that pursuit than exists in any citizen to follow any other legitimate calling or avocation. There is a general right in every citizen to acquire, possess and protect property, and yet in the absence of such constitutional limitation upon the power of taxation, it extends, as is said by Mr. Justice COOLEY, "to every trade or occupation, to every object of industry, use or enjoyment, and to every species of possession." The power of the legislature to impose a license tax upon lawyers is affirmed in the following cases: 21 La. Ann. 201; 12 Mo. 268; *Stewart v. Potts*, 49 Miss. 749; *Ould v. City of Richmond*, 23 Gratt. 464; s. c., 14 Am. Rep. 139; *Jones v. Paige*, 44 Ala. 658.

The decree of the Circuit Court is affirmed.

Decree affirmed.

BROWNE V. BROWNE.

(17 Fla. 607.)

Statute of limitations — as to mortgage, when not bar.

A suit in equity to foreclose a mortgage can be maintained, notwithstanding an action at law upon the accompanying note is barred by the statute of limitations.*

* See *Blazell v. Nix* (80 Ala. 261), s. c., 21 Am. Rep. 38, and note, 41.

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SUIT to foreclose a mortgage. The defendant had judgment below. The facts are stated in the opinion.

R. W. Davis, W. W. Hampton, B. H. Thrasher and Jesse H. Goss, for appellant.

R. B. Hilton, R. F. Taylor and E. C. F. Sanchez, for appellees.

WESTCOTT, J. On the 29th of October, A. D. 1878, John Browne filed his bill in the Circuit Court of the State of Florida for the fifth judicial circuit in the county of Alachua, against Adaline Brown, Louis A. Barnes and Sarah R. Barnes, his wife, Thomas H. Barnes and Louisa J. Barnes, his wife, and Elizabeth G. Goldsmith, heir at law and administratrix of Jeremiah Goldsmith, deceased, seeking to foreclose a mortgage upon real estate therein mentioned, executed on the 20th of April, A. D. 1867, by Leonard L. Browne, Adaline Browne, Louis A. Barnes, Susan J. Park, John H. Park and Jeremiah Goldsmith, to secure a note in language as follows :

"\$2,500.

GAINESVILLE, FLA., February 4, 1867.

"Eighteen months after date we promise to pay John Browne, or order, two thousand five hundred dollars, with interest at 7 3-10 per centum, valued received.

LEONARD L. BROWNE,
JOHN H. PARK,
JEREMIAH GOLDSMITH,
LOUIS A. BARNES."

[Omitting minor matters.]

The remaining grounds of appeal, as stated, are based upon the rulings of the chancellor, pronouncing the following pleas good:

First, That the promissory note mentioned, set out, and sued upon in the complainant's bill of complaint for the sum of two thousand five hundred dollars, which bears date the 4th day of February, A. D. 1867, and is attached to complainant's said bill as a part thereof, and is referred to therein as exhibit A, and which is the foundation of the complainant's bill herein, for the collection of which the said bill has been exhibited against these defendants, did not accrue within five years next before the filing and exhibiting of the said complainant's said bill against these defendants, and

that the said complainant is estopped and barred by the statute of limitations of the State of Florida from further claiming or collecting the said promissory note sued upon in the bill herein, or any part thereof.

Second, And the said defendants, etc., say that the said promissory note sued upon in the bill herein is not their act and deed; and that they, nor either of them, have ever undertaken and promised in manner and form as is alleged; and that they, nor either of them, have ever been in any way bound or obligated to pay said note, or any part thereof, all which matters and things, etc.

Treating the first plea as it has been treated in argument, that is, as setting up a limitation of five years as a bar to this suit, the question here presented is whether in this State five years is a bar to a suit in equity to subject to sale real estate mortgaged to secure the payment of a sum due, as shown by a promissory note named in the mortgage. Our statute provides that a civil action upon any contract, obligation or liability, founded upon an instrument of writing under seal, shall be commenced within twenty years after the cause of action shall have accrued; and that a like action upon any contract, obligation or liability, founded upon an instrument of writing not under seal, shall be commenced within five years after the cause of action shall have accrued.

It is thus apparent that if this is an action upon a contract, obligation or liability, founded upon an instrument of writing under seal, within the meaning of the statute, this is not a good plea.

The question here therefore is: "Is a suit in equity upon a mortgage of real estate to subject the mortgaged property to sale, and to apply the proceeds to the extinguishment of the mortgage debt, such a civil action? In considering this question it must be remembered that this statute of limitations was passed when the code of practice was in force, under which the term civil action embraced both actions at law and suits in equity.

There are conflicting decisions upon many of the very interesting questions in reference to mortgages which have been alluded to in argument at bar; but as to this precise question, which is really the only question in the cause, we find no conflict in the views of the courts.

An action of similar character to this, is found in 39 Barb. 285. In that case the Supreme Court of New York, in speaking of the

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nature of the action, say: "If this is substantially an action upon the note, then it is barred; for it is an action upon simple contract, and must be brought within six years. Code, § 90. And the plaintiff in such case fails, not because the debt is in fact shown to be paid, but because the law forbids the action. The remedy is taken away. But this is not in terms or effect an action upon the note, * * * and I think here a distinction may be drawn between an action upon the note for the purpose of enforcing a personal liability and an action upon the mortgage for the purpose of enforcing the lien upon the real estate."

The Court of Appeals of New York, 15 N. Y. 510, speaking of the character of an action similar to this, says: "The action to foreclose a mortgage is brought upon an instrument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and by reason of the seal, the debt is not presumed to have been paid until the expiration of twenty years after it becomes due and payable. The six years' limitation has no application to a mortgage. In fact, all instruments under seal are expressly excepted therefrom."

These views of the courts of New York are very important and of great weight in determining the nature of this suit when the statute of limitations of that State is examined and considered with reference to our own statute. There was a limitation of six years to all "actions of debt founded upon any contract, obligation or liability not under seal," and a like limitation to all actions of account or assumpsit founded on any contract or liability, express or implied. 2 R. S. 244. These limitations, it will be seen, are held to be inapplicable to a suit to subject mortgaged property to sale. It will also be seen that a suit of this character is held to be embraced within that section of the statute which reads as follows: "After the expiration of twenty years from the time a right of action shall accrue upon any sealed instrument for the payment of money, such right shall be presumed to have been extinguished by payment; but such presumption may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period."

If an action upon a mortgage is an action upon a sealed instrument for the payment of money, within the meaning of this section of the statute in New York, it is as clear as any proposition can be that an action upon a mortgage in Florida is an action upon a con-

tract, founded upon an instrument of writing under seal. In speaking of the nature of an action upon a mortgage as distinguished from an action on the note which the mortgage was given to secure, WARNER, J., speaking for the Supreme Court of Georgia (8 Ga. 326), says: "Because the remedy on the note is barred by the statute in six years, it does not follow that the creditor's remedy on the mortgage, being a sealed instrument, is also barred. The creditor's remedy on the mortgage is not barred until twenty years." The Supreme Court of Wisconsin, in speaking of the same subject (21 Wis. 329), says: "The action to foreclose is upon an instrument under seal, which acknowledges the debt, the payment of which it is given to secure. And it being thus under seal, the equitable remedy upon it is not lost, although an action upon the note may be barred.

It is thus seen that this case is embraced within a very narrow compass. Is the remedy upon the mortgage a sealed instrument by which a sale of the land, no matter in whose possession it may be, is had, a distinct and different thing from the remedy upon the note by which a general judgment against the maker thereof, alone is had? Is the act of resorting to a court of equity to sell the mortgaged premises an action upon a contract, founded upon an instrument of writing under seal? These are the questions to be determined. It seems to me to be perfectly clear that there is a marked difference between an action for the sale of the land on the one hand, and an action for a general judgment on the other; and it is also very plain that the action upon the mortgage is upon a contract founded upon an instrument under seal. The action upon the note is a personal action, sounding in damages only. The action upon the mortgage is a proceeding to subject the subject-matter of the mortgage contract, the land, to sale. They are proceedings governed by different rules. They reach different ends. True, the consideration for each may be the same, but that the debt may be evidenced as well by the note as by the mortgage does not make the one identical with the other. Being similar in so far as they each constitute evidence of the debt, does not necessarily make alike in other respects.

Our view is that in this State the letter of the statute covers the case; that a limitation by it, applicable to this suit, is found in the letter of the law; that there is no room for argument based upon the views expressed by courts acting by analogy to limitations

at law, or upon presumptions of payments by lapse of time, or upon the theory that a mortgage is an incident of the note, and when the remedy upon the note is barred, the remedy upon the mortgage, its incident, is gone, or upon other rules established by courts based upon a legislative enactment or policy different from that announced in this statute.

In this connection our attention has been called to the statute (ch. 525) laws of this State, entitled "An act to amend the laws now in force in relation to mortgages," approved January 8, 1853.

The effect of this statute is not to take away any remedy in equity. It takes away the legal right of possession from the mortgagee and places it in the mortgagor, but as held in *Gamble v. Pasco*, 15 Fla. 562, the possession of the mortgagor is subject to be controlled in a court of equity when he is guilty of acts inconsistent with such possession. That case in no degree limits the equitable rights or remedies of the mortgagee. On the contrary, the equitable right of the mortgagee under certain circumstances to have a receiver of the mortgaged property, notwithstanding the fact that at law the statute takes away all legal right of the mortgagee to his ejectment, or other action at law by which he can obtain possession, is sustained. So far as the remedy by suit in equity for the sale of the mortgaged land is concerned, the statute provides expressly that mortgages shall be held subject to the same rules of foreclosure, to the same regulations, restrictions, restraints and forms, as "now are, or hereafter may be prescribed by law in relation to mortgages."

There is in this State no method either at law or in equity by which a mortgagee can be adjudged absolute owner of the mortgaged property; in other words, we have no strict foreclosure. His equitable remedy here is a sale of the property to pay his debt, and his rights at law are confined to actions personal upon the debt and the summary remedy under the act to regulate the foreclosure of mortgages by the courts of common law. This last proceeding has been called "an anomalous one for which neither the courts of common law nor equity furnish a precedent." It has been held, however, that after a judgment in a common-law suit upon the debt, he cannot obtain another judgment under the statute, and a judgment under this statute is called "a judgment at law" (2 Fla. 184), and in Georgia, as to a similar statute, it has been held that although the remedy upon the note in a simple action at law may

be barred, this special remedy "on the mortgage, being a sealed instrument," is not barred. 8 Ga. 325.

If the expiration of the time limited at law as the period within which an ejectment might be brought would in equity have created a presumption of payment of the mortgage debt, anterior to this statute, a question never passed upon in this State, then upon the abolition of the right at law, in analogy to which the court of equity created this presumption, it seems to me as a matter of course that the presumption, so far as it was based upon the existence of the rule at law, must pass away with it.

In the absence of the provision of the statute fixing a limitation to this suit, and of the section of the statute (12) limiting all actions for relief not expressly provided for in the other sections (for we think this section [12] would otherwise embrace this action, 24 How. 285), then there would be either no rule of limitation in analogy to which a court of equity would act or the rule would be the limitation upon the note. We do not think, however, that that rule would be adopted as an absolute bar (these not being cases of concurrent jurisdiction) to the equitable remedy, upon the erroneous idea sometimes announced, that the limitation of the remedy destroys the debt, but that the expiration of the time would simply create a presumption of payment, that presumption being of matter of fact liable to be overthrown by proper evidence. In cases of concurrent jurisdiction, where the statute bars the remedy at law, there a court of equity, acting not by analogy, but in obedience to the statute, makes the limitation a bar to the equitable remedy equally as effective and extensive as the statute bars the remedy at law, but in cases other than those of concurrent jurisdiction, such as actions of ejectment, writs of right and real or possessory actions, and actions upon the note, and a suit in equity to subject the land to sale, where the jurisdiction is not concurrent, the statutory limitation is adopted by analogy, the court of equity conforming itself to the public policy, evidenced by the statute, and adopting that period as the time in which payment and satisfaction is presumed.

This distinction in the matter of jurisdiction is well illustrated by the case in the Supreme Court of the United States, cited by respondents here, as the basis of their argument. 12 Pet. 56, and the case of *Cleveland Ins. Co. v. Reed*, 24 How. 287. The case in 12 Peters was a case of concurrent jurisdiction. It was a bill in

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equity seeking partial relief against a bill of exchange, and judgment thereon asking an injunction to restrain the collection of an alleged excess which entered into the judgment through mistake. The Supreme Court of the United States as to this case say: "The courts of law and equity have concurrent jurisdiction, and the complainants having elected to resort to equity, which they had the right to do, were as subject to be barred by the statute in the one court as in the other. In such cases the courts of equity act in obedience to the statutes of limitation, from which they are no more exempt than the courts of law." Here all the rights claimed arose out of the bill of exchange and the relief asked concerned the damages occasioned by its non-payment. The case in 24 How. 284, was the case of a bill to enforce a lien secured by mortgage, in effect, so far as this question is concerned, precisely this case. It arose in the District Court of the United States for the district of Wisconsin. Under the statutes of that State it is provided that where there are concurrent remedies at law and in equity, the remedy in equity is barred in the same time that the remedy at law is barred. It is further provided that "bills for the relief in cases of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue and not after that time." The court held, upon bill filed for a foreclosure or sale of mortgaged property, that there was no corresponding remedy at law, and the bar of ten years was applied. There being no remedy at law corresponding to a suit in equity to sell the mortgaged land, the case of a bill in equity looking to that end does not present a case of concurrent jurisdiction, when viewed in reference to the action at law sounding in damages alone, and resulting in a general judgment. See 13 Wis. 274.

The Supreme Court of the United States, in the case of *Hughes v. Edwards*, 9 Wheat. 498, speaking of the rule in a State where there was no express limitation barring the right to foreclose a mortgage, says: "In respect to the mortgagee who is seeking to foreclose the equity of redemption, the general rule is, that where the mortgagor has been permitted to retain possession, the mortgage will, after a length of time, be presumed to have been discharged by payment of the money or a release, unless circumstances can be shown sufficiently strong to repel the presumption." This view is entirely inconsistent with the idea that a bill to sell mort-

gaged land presents a case of concurrent jurisdiction to an action at law upon the note, and it must be apparent that the case in 12 Pet. 56, has no application here. Cases of concurrent jurisdiction are found stated in Story's Eq. Pl., § 751, and the distinction is well stated in 1 Story's Eq., § 529, where it is said, in cases where the demand is strictly of a legal nature, or might be cognizable at law, courts of equity govern themselves by the same limitations as to entertaining such suits as are prescribed by the statute of limitations in courts of common law. But when the demand is not of a legal nature, but is purely equitable, or where the bar of the statute is inapplicable, courts of equity have another rule, founded sometimes upon the analogies of the law where such analogy exists, and sometimes upon its own inherent doctrine, not to entertain stale or antiquated demands. See, also, 2 Jones on Mortgages, 1192.

Our attention has been called to that class of decisions which limit the suit in equity by analogy to the limitation at law to actions for the recovery of real property. 8 Metc. 87; 3 Md. 55; 3 Johns. Ch. 135; 19 Vt. 526; 21 Ark. 385; 32 Miss. 226; 37 id. 585.

This plea, it will be observed, does not set up seven years, which is the limitation applicable to an action for the "recovery of real property" in this State. Whether, therefore, an action of ejectment or a legal right to possession exists in the mortgagee, under the statute, at any time, is not herein necessarily involved; and the cases in which courts of equity limit the operation of the equitable remedy by analogy to the limitation to the legal remedy for "recovery of real property," are not strictly applicable to this plea.

It is to be remarked, however, that these cases, upon a strict, careful analysis of the principles involved, afford no authority for the view that the equitable remedy is limited by analogy to the limitation existing at law to an action upon the contract naming the amount secured by the mortgage as contradistinguished from, and independent of, the contract embraced in the mortgage. On the contrary, it must be admitted that the legal right to possession, the limitation to the remedy for the enforcement of which the court of equity adopts in such cases by analogy, arises out of, and independent of, the contract constituting the primary evidence of the debt in all cases where that contract is not embraced in the mortgage; and that it does not arise from the mortgage itself as contradistinguished from the note or bond which constitutes the primary evidence of the amount of the debt, and the obligation of the parties.

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Certainly the right of possession, resulting from a mortgage contract, does not come from the amount contracted to be paid by the promissory note which it is given to secure, or from the note.

These cases are therefore in principle authority for the proposition that the limitation for the equitable remedy of sale is not the limitation to the remedy for the recovery of the money contracted to be paid independent of the mortgage; for the limitation thus established by analogy is a limitation to the remedy for the recovery of the possession, the right to which inured under the mortgage, and not from the contract to pay the money.

Again, if the doctrine of these cases is correct, and this limitation to the remedy for the recovery of possession is the only rule controlling, then it follows in this State, where the mortgagee has no right to possession as to which a limitation to a remedy for the recovery of which can exist, that there is no limitation, and we are left, as a court of equity, to be controlled only by some other rule.

Again, these cases in principle are authorities against the view that the equitable remedy to foreclose a mortgage is barred because it is an incident of the debt in the sense that when the debt is not recoverable at law payment in equity is not to be enforced, for they hold that the limitation arises from no such incidental relation, and involve a clear distinction between the debt and the remedy to enforce the debt outside of the mortgage, permitting the remedy at law upon the contract outside of the mortgage to be inoperative, because limited by lapse of time, and yet authorizing a remedy by foreclosure and sale under the mortgage.

Our attention has been called also to that class of cases "holding in specific terms that the statutory period for the recovery on the note having expired, there can be no foreclosure of the mortgage." 12 Tex. 427; 22 id. 561; *Schmucker v. Sibert*, 18 Kans. 104; s. c., 26 Am. Rep. 765; 18 Cal. 482; 2 Neb. 20.

The Supreme Court of Texas bases its conclusion to this effect upon the view that in equity the right of the mortgagor is superior to that of the mortgagee; that the mortgage is an incident of the debt; that the statute bars the debt; the abolition of the distinction between suits in equity and actions at law, and that it was never intended that the mortgagee should recover in ejectment. The principal ground upon which the conclusion is based is that the debt is gone when the remedy for its collection is barred. This is

error which that court has itself recognized in another case (33 Tex. 745), where it is properly held that "the limitation laws of the State of Texas affect the remedy only.

This is the doctrine announced by Lord ELDON and repeated by Chief Justice MARSHALL. In the case of *Spears v. Hartly*, 3 Esp. 81, Lord ELDON, speaking of the operation of the statute of limitations, says: "The debt was not discharged, it was the remedy only;" and Chief Justice MARSHALL, in the case of *Sturges v. Crowninshield*, 4 Wheat. 122, says: "Statutes of limitations relate to the remedies which are furnished in the courts." See, also, 9 How. 407.

The statute of limitations of California, while in some respects it is similar to the statute of this State, makes no distinction in the limitation to actions founded upon instruments of writing under seal, and the limitation to actions founded upon instruments of writing not under seal. This is also true of the statute of Nebraska, the limitation there is to actions upon "a specialty or any agreement, contract or promise in writing." In Kansas, the limitation is to an action upon a specialty or any agreement, contract or promise in writing, and the Supreme Court of that State, when attention was called to those English and American cases differing from the conclusions reached by it as to the operation of the statute of limitations, says that "in England and the States referred to a limitation different from that prescribed for simple contracts in writing was prescribed for specialties." 2 Kans. 390.

We find opposed to the conclusions reached in these cases in the Supreme Courts of Texas, Kansas and California, decisions in Maine, 65 Me. 199; 26 id. 330; in Vermont, 25 Vt. 324; in Massachusetts, 19 Pick. 535; 8 Metc. 24; 4 Cush. 487; 8 Allen, 278; in Maryland, 4 Md. Ch. 262; 1 Bland Ch. 282; in Michigan, 11 Mich. 265; in Connecticut, 11 Conn. 160; in Wisconsin, 20 Wis. 680; in Georgia, 8 Ga. 326; in Alabama, 1 Ala. 742; in Mississippi, 2 S. & M. 697; 37 Miss. 585; 32 id. 212; in Missouri, 61 Mo. 50; in Nevada, 1 Nev. 621; 2 id. 265; 9 id. 208; in Ohio, 11 Ohio St. 46; in New York, 7 Pai. 465, and in Oregon, 5 Oreg. 130.

The case of *Dearman v. Wyche*, 9 Sim. 572, which has been called to our attention, presents the case of a plea of the statute of limitations under 3 and 4 Will. 4, ch. 27, § 40. The language of that statute is essentially different from the limitation prescribed in our statute, and I am unable to see its application to the case at bar. The law before this statute (ch. 27) is stated in 2 Hare, 341, to have

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"enabled a creditor to enforce a lien where his debt as against the person is barred by the statute of limitations."

Entertaining these views, we think there was error in the action of the court, sustaining the plea of the statute in this case.

The decree is reversed and the case will be remanded for further proceedings.

Decree reversed.

SOUTHERN EXPRESS COMPANY V. VAN METER.

(17 Fla. 732.)

Carrier — express company — delivery to wrong person.

One forged a telegram in the name of another person, requesting a National bank to forward to Gainesville, Florida, \$500 to such other person. Upon the telegram being received, the agent of such other person gave his note for the money (which was subsequently paid), and the bank forwarded the money as desired by express. The express company delivered it to the sender of the telegram. The agent making the delivery knew that the party was a stranger who had just arrived in town. The innkeeper with whom the stranger lodged called with the stranger for the package and treated him as the party to whom it was addressed, but there was no identification or request by the agent for an identification. *Held*, that while the innkeeper may have been known to the agent as worthy of trust and confidence, the company was liable for the loss occasioned by the delivery to the wrong person.*

ACTION to recover moneys wrongfully delivered. The opinion states the case. The plaintiff had judgment below.

T. F. King, for appellant.

R. Fenwick Taylor, for appellee.

WESTCOTT, J. [Omitting other matters.] We will examine this case upon the evidence and instructions. What is the case?

A person, not Doctor Samuel Van Meter, sends from Jacksonville, Florida, a telegram in the doctor's name to the National Bank

*To same effect, *Houston, etc., Ry. Co. v. Adams* (49 Tex. 743), 30 Am. Rep. 116. Compare *Western Union Tel. Co. v. Meyer* (61 Ala. 158), 33 Am. Rep. 1.

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of Charleston, Illinois, about the first of March, A. D. 1879, requesting the bank to send \$500 by express, care of the Arlington Hotel, Gainesville, Florida. The telegram was exhibited to John Van Meter, a son of the doctor, his agent at Charleston, who executed a note for \$500 (which was subsequently paid by Dr. Van Meter) and directed the bank to send the money. The money was placed in an express envelope, sealed with the seal of the bank and addressed to Dr. S., or Dr. Samuel Van Meter, Gainesville, Florida, at the Arlington Hotel or House, and the package delivered to the American Express Company at Charleston, Illinois, for transmission to Gainesville, Florida, the point of destination. As one and last of the express companies on the line, the Southern Express Company received the package for transportation and delivery. This company received the package and delivered it to a party other than Dr. Samuel Van Meter, who (Dr. V.) subsequently, after its delivery to the wrong person, demanded the package of the agent of the express company, who could not and did not deliver it.

[Omitting a detailed statement of conflicting testimony.]

Thus stating the case, and reciting the evidence, so far as there is any conflict, the only question is, does the evidence disclose a performance of its duty by the Southern Express Company? It appears that it transported the package to its place of destination, but that it delivered it to a person not its owner, and not the person to whom it was addressed. The only question in the case was whether there was that care exercised in the matter of identification and delivery here which the law requires. Even accepting the testimony of the agent of the express company, there was not such care exercised here as the law requires. It is shown that the agent expected the party to whom the package was addressed to arrive from another place; that he was not a resident of the town at which the package was to be delivered; that the agent did not know him. This agent meets the party assuming to be the person to whom the package is addressed at the train at the depot. While there the proprietor of a hotel, other than that at or to the care of which the package was directed, asks him if he had a package for Doctor Samuel Van Meter, and upon his replying in the affirmative, the hotel-keeper says he is here now. Upon being asked to bring the package to the hotel, the agent declines so to do; not for want of identification, but because he would have no time. The agent tells the hotel-keeper that if he would bring Dr. V. to his office he would

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deliver the package. When the party comes to the office to get the package, the agent delivers it without any further identification than that the person who accompanies him, a hotel-keeper, known to the agent as a reliable person, with whom the stranger is stopping, treats the stranger as Dr. Van Meter, the hotel-keeper not stating that he knew the stranger to be the person he represented himself to be, and without any identification at all. Had the agent asked the hotel-keeper whether he knew this party to be the person he represented himself to be, and how he knew him, the agent would have been at once informed of the extent of the hotel-keeper's knowledge, and that was that he only knew that the man so represented himself. The express company was a bailee of the property, under an obligation to deliver to the rightful owner, and its delivery to a stranger, not the rightful owner, cannot be justified upon the ground that a keeper of a hotel at the point of destination, known to the agent, and in whom he has confidence, simply treated the party as the person entitled to delivery, the agent at the same time knowing the party to whom he delivered the package was a stranger who had just arrived in the town.

This being the first case of this character in this State, we do not deem an examination of the instructions given in this case either improper or inappropriate. They were each excepted to.

[Omitting an unimportant matter.]

The next instruction was in substance that the express company, without reference to the party who may have ordered the money sent, or who may have telegraphed for it, was bound to deliver it to the plaintiff if it was sent to him and he was the owner. This instruction, viewed in reference to the testimony, is nothing more than that a forged telegram is no excuse for the delivery to a party not the owner, and to whom it was the contract of the carrier to deliver it.

Notwithstanding the forged telegram, this carrier, in making a personal delivery, was bound by law to deliver to the person to whom the package was addressed, he being its true owner. *Am. Ex. Co. v. Fletcher*, 25 Ind. 492; 29 id. 27. An express company belongs to that class of carriers who undertake to make a personal delivery of the goods to the consignee, and it is held to great strictness in the performance of this duty. It is the settled doctrine of England and of this country that there must be an actual delivery to the proper person at his residence or place of business, to his

number, or to the party in whose care addressed, and in no other way can the carrier discharge his responsibility, except by proving that he has performed such engagement, or has been excused from the performance of it, or been prevented by the act of God, or a public enemy. 5 B. & Ald. 52; 3 Brod. & Bing. 177; 2 Kent Com. 604; 23 Ill. 201; 7 Wis. 1; 99 Mass. 259; 118 id. 280; 45 N. Y. 13; 50 Ala. 350; 72 Penn St. 274. A modification of the rule as to personal delivery is sometimes sustained upon the ground of custom or usage, but nothing of that kind enters into this case.

The third instruction is to the effect that the company here was bound to deliver unless prevented by the act of God or the public enemy; that no act that is done by human agency will excuse it from so doing; that the carrier is bound under the law to deliver to the proper person, and that a delivery by mistake to the wrong person does not excuse. This is the general rule. The fourth instruction is in principle embraced in the others, and we see no necessity for its extended examination.

The fifth and last instruction is substantially that the address upon a package delivered to a common carrier, is of the very essence of the contract between the carrier and the sender of the package and of the person to whom it is sent, and if the carrier delivers the package to any other point, or to any other person than at the exact point, or to the identical person to whom the package is addressed, the carrier is liable for any loss sustained.

Goods thus forwarded by express must be delivered in accordance with the directions upon the package containing them, and in this view this direction may be regarded as a part of the contract. This is the general rule applicable to this case. 55 Barb. 443; 45 N. Y. 13; 49 id. 442; 5 Duer, 55.

Judgment affirmed.

WILSON V. SPARKMAN.

(17 Fla. 871.)

Jurisdiction — limit of amount — interest.

A court having jurisdiction only of actions where the amount in controversy does not exceed \$300, has no jurisdiction of an action on a note for \$300 and interest, alleged to be wholly due.

Wilson v. Sparkman.

BILL to restrain collection of a judgment. The facts are stated in the opinion. The complainant had judgment below.

Thrasher, Davis & Hampton, for appellants.

R. F. Taylor. for appellee.

RANDALL, C. J. This was a bill in equity filed by appellee for the purpose of enjoining defendants, appellants, from executing a judgment against one Pardee, by levying upon land formerly owned by Pardee and now owned by appellee.

The judgment was rendered in the County Court of Alachua county, while that court had jurisdiction in "civil cases where the amount in controversy does not exceed \$300." The language quoted is from section 11, article VI, of the Constitution of 1868.

The judgment was rendered in the County Court for \$334 damages and \$10.04 costs. The declaration in the case was upon a note for \$300, dated April 8, 1868, payable December 15, 1868, with interest at eight per cent, upon which no payments or credits were made, and the amount claimed was \$300 and interest. Declaration filed in July, 1869, and judgment was entered in September.

It was decreed by the Circuit Court that the execution be enjoined as against the property of the complainant upon the ground that the County Court had no jurisdiction of the cause of action, and that the judgment was null and void. The language of the Constitution was that "the County Court shall have jurisdiction of all misdemeanors and all civil cases where the amount in controversy does not exceed three hundred dollars."

It is claimed by appellants that because the note or contract sued on was for \$300, exclusive of interest, the amount in controversy was only \$300. The rule controlling the jurisdiction of the County Court was, that if by the terms of the contract sued on the amount actually due was in excess of \$300, the court had no jurisdiction of the cause of action. Here the sum due by the express terms of the note was over \$300 at the time suit was commenced. The declaration shows this, and claims the amount due for principal and interest. This was alleged to be the amount unpaid and payable, and is therefore the amount involved in controversy.

Appellants cite several cases as authority for the position that the principal of a note, exclusive of the interest, determines the

"amount in controversy," and we examine them *seriatim*. *Hedgecock v. Davis*, 64 N. C. 650, was a suit upon a note of \$200 before a justice of the peace, who had jurisdiction of "actions founded on contracts wherein the sum demanded shall not exceed \$200," according to the State Constitution. The court held that the value of the note was not the criterion, but the sum mentioned in the contract; interest being a mere legal incident, and was no part of the note. (We conclude that the note did not in terms bear interest, but was only a promise to pay the principal.)

A statute of North Carolina also expressly excluded interest upon contracts in determining the jurisdiction, and authorized the remission of any sum over \$200 so as to save the jurisdiction. This legislative action is sustained by that court as a legislative determination of the proper construction of the Constitution.

In *Fisher v. Hall*, 1 Ark. 275, it was held that the Circuit Court had not jurisdiction of an action of covenant upon a bond for \$100, notwithstanding interest had accrued, the jurisdiction given being confined to cases in which "the sum in controversy is over \$100." This is put upon the ground that "it is the amount or character of the contract, and not interest, that enters into the controversy." This is, in our view, a more consistent theory than that adopted in the North Carolina case. The case does not show that interest was expressly contracted for by the bond in suit.

In the Texas case, *Clark v. Brown*, 48 Tex. 212, the question in issue here is not involved. The Constitution of Texas gave jurisdiction to justices of the peace where the "amount in controversy, exclusive of interest," was \$200 or less, and the only question was whether more than \$200 was due of the principal.

In *Jackson v. Whitfield*, 51 Miss. 202, it was held that the principal sum was the guide in determining the jurisdiction of justices' courts in a case where interest was not a part of the contract, and attached only as damages by operation of law; and the constitutional provision is cited that "the principal of the amount in controversy" shall determine the jurisdiction, and the decision was put upon this ground.

The court in 48 Iowa, 652, held expressly that where the action involved an amount beyond the jurisdiction of a justice of the peace, he was ousted of jurisdiction and could not give judgment for a sum within it.

In Pennsylvania, *Peter v. Schlosser*, 81 Penn. St. 439, a justice

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of the peace has jurisdiction. "in cases where the sum demanded is not above \$100." The court holds that where the items of the plaintiff's claim amounted to \$137, and it was reduced by payments to less than \$100, the justice of the peace had jurisdiction; but it was not obtained by giving credits for an independent account as an offset. The application of this case to the one at bar is not obvious. The foregoing are all the cases cited by appellants. None of the cases cited by them seem to be in point except the Arkansas decision; and in that it does not appear that the obligation sued upon bore interest, except by operation of law in the nature of damages, which was not embraced in the terms of the bond. In a later action before a justice of the peace in Arkansas, upon a bond for the payment of ninety-five dollars and interest, and at the time suit was brought the amount due was over \$100, it was held, under an act conferring jurisdiction in cases where the amount claimed did not exceed that sum, that the justice did not have jurisdiction, and a judgment in such case was void and furnished no protection to the party or officer executing it. The court says that the covenant sued on as well as the judgment conclusively show that the amount claimed did exceed \$100. *Howell v. Milligan*, 13 Ark. 40. And in *Hempstead v. Collins*, 6 id. 533, it was held that where the entire account of the plaintiff was \$260, and credits were given so that the balance due was about sixty dollars, this balance was "the amount in controversy," thus showing that the amount actually due was deemed by the court the amount in controversy, instead of the amount of the plaintiff's entire account.

In Illinois it was held that an action might be maintained before a justice of the peace upon a note for \$100, if no interest was claimed. 2 Ill. 594; 7 id. 389. In 45 Penn. St. 235, the same ruling was made, the court holding that the interest might be waived, where interest would swell the amount to over \$100. In South Carolina where a justice gave judgment for an amount exceeding twenty dollars, the excess being interest, it was set aside as unconstitutional. 2 Brev. 41; id. 399. In *Simpson v. McMillon*, 1 Nott & McC. 192, the court held that the interest was as much a part of the contract as the principal of a note, whether by express stipulation or by the effect of the contract, and that the demand including interest exceeding the limit of jurisdiction, the justice could not render judgment. The Court for the Correction of Errors in New York, (*Lake v. Eddy*, 15 Wend.), held that where interest was

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stipulated in a bond, it was as much a part of the obligation and demand as the principal.

After searching all the authorities at hand we find no case in which, where the jurisdiction is limited to a certain "amount in controversy," such amount is determined by the amount of principal of a note or bond in terms bearing interest, unless such determination is founded upon express provisions of a constitution or statute. On the contrary, the general rule is determined to be that the amount actually due and for which judgment is demanded is the proper test in determining the limit of jurisdiction.

In this case the declaration, the evidence and the judgment of the County Court prove that the amount in controversy was over \$300, and the only conclusion is that the court had no jurisdiction, and its judgment was void.

The decree is affirmed.

Decree affirmed.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

WILSON V. McMILLAN.

(23 Ga. 16.)

Infancy — emancipation

An insolvent father may emancipate his minor child, even as against his creditors, and although the child remains at home and is hired by the father. (*See note, p. 117.*)

CLAIM of property levied on by a judgment creditor of the father of the plaintiff. The opinion states the facts. The plaintiff had judgment below.

Winn & Simmons, for plaintiff in error.

N. L. Hutchins, for defendant.

BLECKLEY, J. The record discloses that the daughter was a minor, but does not give her exact age. It shows that the father and daughter made a contract in the commencement of the year 1876, by which it was agreed that she was to receive for her labor in the crop of that year all the cotton that might be produced ; that

she worked on the father's farm with him and helped to cultivate it; that the area planted in corn was thirteen or fourteen acres, and that planted in cotton was five acres; that two bales of cotton were produced; that one of these was sold by him, the proceeds of which he kept, and the other was levied upon by virtue of a judgment against him, rendered in the previous year, that is, the year 1875; that on the faith of her contract with her father, she opened an account with a merchant, and from time to time, between January and October, purchased supplies and merchandise, some for herself and some for the family, expecting and promising to make payment out of the cotton or its proceeds; that if the cotton should be sold away from her this debt would be left unpaid and unprovided for; that the contract between her and her father was brought about by a threat on her part to leave him, as the other children had done; and that to the bale of cotton levied upon as above mentioned she interposed her claim, which claim was decided by the presiding justice of the peace in her favor.

1. In section 1792, the Code declares, "until majority, the child remains under the control of the father, who is entitled to his services and the proceeds of his labor." The same section provides that this parental power is lost, "by his consent to the child's receiving the proceeds of his own labor, which consent shall be revocable at any time." Other modes of losing it are enumerated, but they are irrelevant. In his excellent work on Master and Servant, § 25, Mr. Wood says: "It seems that emancipation may be implied even when the minor resides at home and works for his father, from a promise on the part of the father to pay him for his services during his minority, so that the minor may maintain an action against the father even for such services." *Hall v. Hall*, 44 N. H. 293; *Jenny v. Allen*, 12 Mass. 377; 15 Eng. 211. No doubt the agreement would have to be clearly established. 64 Penn. St. 480. As to the rights of the father's creditors they would seem to be no more absolute over the prospective labor of the child than over that of the father himself. Certainly a debtor may work gratuitously for whom he pleases, and his creditor cannot oblige him to exact wages. While a debtor cannot give away his property to the prejudice of his creditors, he may give away his labor. So, too, may he give away his minor child's labor, either to the child itself or to another. A father is not bound to claim the earnings of his child, and appropriate them to his creditors. 3 Casey, 220. Of course, he cannot take

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the earnings in fact, and cover them up against the claim of his creditors by a mere colorable arrangement with the child. But it is not apparent why a *bona fide* hiring of the child by him before the labor is performed is not as valid a mode of waiving parental right as any other. The good faith of the transaction is open to scrutiny, and is for decision by the tribunal trying the fact. A reasonable part of the prospective crop, in a fair and honest contract, may be promised the child at the time of the hiring, as compensation; and such part, when it comes into existence, will be the property of the child, and not liable to seizure to satisfy the father's debts. In the present case, the judgment was older than the contract of hiring, but as the hiring took place before the crop was planted, and therefore before the judgment lien could attach, and as there is no certainty that but for the contract and the labor done in pursuance of it, the cotton levied upon would ever have been produced, we think the date of the judgment makes no difference. When a laborer hired to plant and cultivate a crop is to receive a definite part of the crop as wages, as all the cotton, or all the corn, the hirer never has any real, substantial ownership of such part as against the laborer, provided the contract of labor is fully and faithfully performed. Grant that the father could have defeated the daughter's right by revoking his consent as given in the contract of hiring, still, he did not in point of fact revoke his consent as to the one bale levied upon, if he did as to the other. His creditor could not revoke for him, and without revocation the daughter's would be and remain the superior right.

2. Fraud, indeed, would break up the daughter's title, but the magistrate, we may assume, found no fraud; and the evidence is not such as to force him to find fraud.

Judgment affirmed.

NOTE BY THE REPORTER.—A father may, by agreement with his minor child, relinquish to the child the right he has to his services and earnings, and he will afterward have no right to claim his wages from his employers, but the child may claim and recover them in his own name for his own benefit. *Hall v. Hall*, 44 N. H. 298; *Jenness v. Emerson*, 15 id. 486; *Jenny v. Alden*, 12 Mass. 375; *Wilmington v. Nightingale*, 15 id. 274; *Corey v. Corey*, 19 Pick. 30; *Wood v. Corcoran*, 1 Allen, 405; *Chase v. Eukins*, 2 Vt. 290; *Chase v. Smith*, 3 id. 536; *Morte v. Welton*, 6 Conn. 547; *Whiting v. Earle*, 3 Rich. 201; *Stiles v. Granville*, 4 Osh. 458; *Jennison v. Graves*, 2 Blackf. 440; *Burlingame v. Burlingame*, 7 Cow. 92; *Monaghan v. School Dist.*, 38 Wis. 100; *Luckman v. Wood*, 25 Cal. 147; *Boynton v. Clay*, 56 Me. 286; *Farrell v. Farrell*, 3 Houst. 633.

Emancipation gives the child the right to his own wages, his own time, and the control of his own person, and discharges the parent from obligation to support unless the child becomes unable to support himself.

Emancipation may be in writing or by parol, at any time during minority; for the whole minority or a shorter term; gratuitous or for a valuable consideration. It requires the child's assent. If gratuitous and by parol, it is revocable until acted on. *Abbott v. Converse*, 4 Allen, 586. The court said: "As it may be held by gift or license, without any consideration, there is no reason why the gift, when accepted, should be any more revocable without the consent of the devisee, than other gifts. But a gift is not binding on the donor until accepted; and the acceptance of a gift of this character must be by acting upon it. Until it is acted upon, it must, from the nature of the case, be revocable." In *Chase v. Atkins*, 2 Vt. 290, the court said: "Possibly the father might reassert the right over the son, and control his earnings during his minority. The son may so conduct that it would be his duty to do so." So, in *Clark v. Fitch*, 2 Wend. 463, a case of oral emancipation, without consideration, the court said: "I apprehend the paternal rights of the father were not relinquished by what passed between them. There was no consideration for the relinquishment of his daughter's services, and in my opinion he might at pleasure revoke the license he had given his daughter, and call her home and employ her in his service till she should arrive at maturity." So, also, *Everett v. Sherfey*, 1 Iowa, 363. To same effect where child remained at home. *Stovall v. Johnson*, 17 Ala. (N. S.) 19. But after payment or performance the child is entitled to his earnings to that time. *Shute v. Dow*, 5 Wend. 304; *Shedden v. Everingham*, 3 Dutch. 143; *Gale v. Parrott*, 1 N. H. 28; *United States v. Metz*, 3 Watts, 406; *Corey v. Corey*, 19 Pick. 29; *Torrans v. Campbell*, 74 Penn. St. 472. And notice to the debtor not to pay the son will not revoke the son's right. *Morse v. Walton*, 6 Conn. 347.

Emancipation is always presumed in cases of necessity. Thus, if the parent absconds, expels his child, or leaves him to shift for himself, and refuses or neglects to provide, emancipation is presumed. *Cloud v. Hamilton*, 11 Humph. 104; *Nightingale v. Withington*, 15 Mass. 275; *Stansberry v. Bertron*, 7 W. & S. 352; *Everett v. Sherfey*, 1 Iowa, 363; *The Aetna*, 1 Ware, 474; *Canover v. Cooper*, 3 Barb. 115; *Lyon v. Bolling*, 14 Ala. 733; *Ream v. Walkins*, 27 Miss. 518. In *The Aetna*, *supra*, it is said: "It would certainly be a great defect in the laws of any civilized people, if they furnished no mode by which the innocence and helplessness of infancy, and the purity and ingenuousness of youth could be protected from the brutality of an unnatural parent. As a father may forfeit his right to the custody and control of his child's person by abusing his power, so by neglecting to fulfill the obligations of a father, he may forfeit his right to the fruits of his child's labor. If he provides no home for his protection, if he neither feeds nor clothes him, nor ministers to his wants in sickness or health, it would be a most harsh and unnatural law which authorized the father to appropriate to himself all his child's earnings. It would be recognizing in fathers something like that pre-eminent and sovereign authority which has never been admitted by the jurisprudence of any civilized people, except that of ancient Rome, whose law held children to be the property of the father, and placed them in relation to him in the category of things instead of that of persons." So, in that of *Canover v. Cooper*, 3 Barb. 115, where the father was absent several years, leaving his infant son to manage for himself, and contributed nothing to his education or support, and did not interfere in his engagements. The court said: "Where a parent, from confidence in his minor child, or as is sometimes, although I hope not often the case, from indifference as to his welfare, allows the child to manage for himself, and to obtain his support from his own industry, the reasons for the rule fail, and the rule falls with them." So in *Ream v. Walkins*, 27 Miss. 519, where the parents resided in another State, the court said: "The fact that the minor is suffered to leave his parents' house, and go abroad to shift for himself, ought to be satisfactory evidence of the parents' consent to the son's receiving and enjoying his own wages; otherwise he would be without the means of procuring bread." "As it would not be presumed that he was from home without leave, it would be inferred as a matter of necessity that he had a right to work for himself in order to obtain a living." And the court said, in *Nightingale v. Withington*, 15 Mass. 274: "But where the father has discharged himself of the obligation to support the child, or has obliged the child to support himself, there is no principle but that of slavery which will continue his right to receive the earnings of the child's labor. Thus, if the father should refuse to support a son, should deny him a home, and force him to labor abroad for his own living, or should give or sell him his time, as is sometimes done in the country (although this latter practice is certainly

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questionable as to any promise made in consideration of it), the law will imply an emancipation of the son." But in *Stiles v. Granville*, 6 Cush. 458, it was held that mere proof that the father had permitted the son to go into another State for employment, and to contract for his services, would not raise a presumption of law of emancipation, and the consent of the father that the son might sue for those services would not authorize a presumption of law to support a suit in the son's name. The court held the question one of fact. The child is considered emancipated, his father being dead, and his mother remarried, and he suffered to live apart from her. *St. George v. Deer Isle*, 3 Greenl. 390. So in *Wells v. Kennetunk*, 8 Id. 300, where the widow resigned her son to the care of his grandfather and did not contribute to his support, and he did not seek her aid nor submit to her control.

Slight circumstances will sustain a finding of emancipation, although not implying misconduct on the father's part. So where the mother, after the father's death, permitted the child to leave home and provide for himself, and to receive and invest his own wages, she could not claim the investment. *Campbell v. Campbell*, 11 N. J. Eq. 273. To the same effect *Johnson v. Gibson*, 4 E. D. Smith, 281; *Decks v. Grissom*, 1 Freem. Ch. 438; *Boobier v. Boobier*, 39 Me. 406. In *Clinton v. York*, 26 Id. 167, the father said he would not have the child at his house, that his wife was quarrelling with her, and that he was not able to take care of her under the circumstances she was in. Her brother took her to his home, and she was there delivered of a child. Held, not an emancipation. But in *Wordell v. Cogswell*, 2 Metc. 89, where the father lived apart from the mother, and suffered his minor to remain with the mother, to be supported and employed by her, and to employ himself as he pleased and take his own wages, it was held that he could not claim his wages from one with whom he had engaged at the mother's request. The court said it was a "qualified emancipation," and so, in *Johnson v. Gibson*, 4 E. D. Smith, 121, a minor son, over twenty, having been a clerk, receiving his own wages, but residing in his father's family, went to California against the wishes but with the consent of his father, who advanced his passage money, but did not receive his earnings nor provide for his support aboard, held, that the father was not liable for the expense of nursing him in a dangerous illness. So, where the child is allowed by the father to leave home, work for his own support, and contract for himself without interference, he may acquire and hold property, and sue concerning it. *Boobier v. Boobier*, 39 Me. 406. *Duringame v. Burlingame*, 7 Cow. 93; *State v. Ince*, 5 Wend. 206, are to the same effect. Evidence that a minor is in the habit of doing business on his own account and in his own name, and of becoming responsible for his own supplies, is competent to show emancipation. *Lackman v. Wood*, 25 Cal. 147. But where the father was present and saw his minor daughter sign in her own name an agreement to act as a teacher, this alone would not show a relinquishment of his right to her wages. *Monaghan v. School Dist.*, 35 Wis. 100. Whether it would be otherwise if he had himself executed the contract authorizing payment to her was queried. Id. In *Whitney v. Earle*, 3 Pick. 301, PARKER, C. J., however, said: "We go so far as to say that when a minor makes a contract for his services, on his own account, and the father knows it and makes no objection, there is an implied assent that the son shall have his earnings." But if the parent acts as next friend in his child's suit for his own earnings, the consent will be presumed. *Boynton v. Clay*, 58 Me. 236. So, where the father was a witness for the son, did not claim the wages, and spoke of the transaction as the son's. *Scott v. White*, 71 Ill. 287.

Marriage with the father's consent, it seems, emancipates. *Taunton v. Plymouth*, 15 Mass. 203; *Dick v. Grissom*, 1 Freem. Ch. 428. But not so where it was without consent. *White v. Henry*, 24 Me. 531. The court said: "To allow this defense would hold out encouragement to sons impatient of parental control while in their minority to resist the reasonable authority of their fathers, and give the latter little means to secure their own legal rights beyond the exercise of physical restraints; would offer inducements to youth to enter into imprudent and ill-advised marriages, which maturer years would cause them to regret and deplore." But if the father turns the child out of his house to shift for himself, he deprives himself of any right of action under the statute against marrying minors without consent of parents. *Stansbury v. Bertram*, 7 W. & S. 362. The court said: "The father has ceased to stand in the relation of parent, or consequently of a party who could be grieved. By turning his daughter loose on the world to shift for her-

self he relinquishes his paternal rights in relation to her person, and absolved her from filial allegiance. What though she were permitted to return to him when the intoxication which was the cause of her expulsion had passed away? It was only to be turned out of doors when he should again get drunk. I pretend not that a single expulsion would forfeit his rights as a parent, but a repetition, attended with treatment which would render a continuance of her residence with him intolerable, would authorize a departure from his house, and enable her to contract marriage as an agent independent of him. There was evidence of such repeated acts of barbarity and violence to this daughter and the rest of the family as justified her in forming a connection and an establishment independent of him." Consent to marriage is inferred from the child's remaining in his father's family thereafter. *Dick v. Grissom*, 1 Freem. Ch. 498.

Emancipation may take place although the child remains at home. *McCloskey v. Cyphert*, 27 Penn. St. 230. The court said: "The father's renunciation of all legal right to the son's labor is not the less broken because other family ties continue unbroken." But contra, *Godfrey v. Hays*, 6 Ala. (N. S.) 503.

Emancipation is not presumed where the child leaves home without consent, his father being able and willing to provide. *Angell v. McSelan*, 16 Mass. 28.

After emancipation the father may contract to employ and pay his child for his services, and he will be bound like a stranger. *Hall v. Hall*, 44 N. H. 293. The father may take a lease from his emancipated son. *Luckman v. Wood*, 23 Cal. 147.

The fact that the father received the earnings or the fruits thereof does not revoke or annul the emancipation. Thus, in *Jenny v. Alden*, 12 Mass. 375, the father orally agreed with his son that the son should have the benefit of his own earnings; from time to time the father received those earnings, and being unembarrassed purchased lands to an equal value, paying the consideration and having the grantor convey directly to the son. The title of the son was upheld as against a creditor of the insolvent absconding father. The court said: "This agreement was a lawful one, and the money received by the father from the earnings of the son may be equitably considered as the earnings of the son, which, if he could not obtain by coercion, was yet a good and valuable consideration for any promise by the father, and would fully justify the consideration in this deed as paid by the son." And in *Chase v. Elkins*, 2 Vt. 290, the same was held, where the son bought cattle with his earnings and lent them to his father. And in *Furrell v. Furrell*, 3 Houst. 699, the court said: "If a father emancipates his minor child, and such child by industry accumulates money, the money is his money and not his father's. And if the father receives money from such minor child, not as due to or belonging to himself, but receives it and recognizes it as money belonging to his child, he cannot afterward legally claim or hold it as his own, on the ground of its being the fruits or profits of such child's labor, and more especially if it was understood between them that the father received it either to invest or hold it for his child's benefit. It has been contended by the counsel for the defendant that if any money was paid to him by his son it was paid voluntarily, and that as the money was the earning of a minor child it cannot now be recovered back. In other words, that there is no legal obligation resting on the father to restore the money to his son. Now this depends upon the question as to whether the father by his conduct toward his son emancipated him from his service. If he emancipated him, then the money earned by the son belonged to the son; and the latter has just as much right to maintain this action, and to recover whatever amount is due to him, as any other person would have to recover back money which he had deposited in the hands of another."

The father's creditors cannot attach a debt due for services of an emancipated minor. *Bray v. Wheeler*, 29 Vt. 514; *McCloskey v. Cyphert*, 27 Penn. St. 230; *Dick v. Grissom*, 1 Freem. Ch. 498; *Chase v. Elkins*, 2 Vt. 290. In the latter case, *supra*, the court said: "If the father's right to the son's labor can be called property, he should have the right to dispose of it in good faith, as he has to dispose of other property. He should have the right that he may consult the genius, capacity and inclination of his son, and direct the whole for the best interest of himself and son. If he deems it best for his son to serve as an apprentice to some trade, or enjoy the patronage of some gentleman of the bar and become a lawyer, or the patronage of some clergyman and become a preacher, no creditor has a right to interfere with this, and claim the son to labor that he may attach his earnings."

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The father may emancipate his child, although the father is insolvent at the time. *Attwood v. Holcomb*, 39 Conn. 270; s. c., 12 Am. Rep. 388; *Wambold v. Pick*, 50 Wis.; *Lockman v. Wood*, 25 Cal. 147. If the father "happens to be in debt he is not bound to work his son or daughter as he would work a horse or a slave for the benefit of his creditors." *McCloskey v. Cyphert*, 27 Penn. St. 320. A creditor cannot make his debtor work in order to pay the debt, nor can he force him to make his children work, or sell, under execution, the valuable interest which a father has in the services of the child, or which a master has in the service of an apprentice." *Winchester v. Reed*, 3 Jones L. 373. In *Dierker v. Hess*, 54 Mo. 350, the court said: "The doctrine contended for by appellants' counsel is, although supported by several authorities, peculiarly abhorrent to my mind. It is not necessary, that the father, in order to give his minor son the privilege of receiving the fruits of his own labor, should proclaim that fact from the housetops, or accompany it by some token or ceremonial, as open and as odious as that which formerly attended the manumission of a slave; nor is it necessary to accomplish that end, that the son should cease to be a member of his father's family; that the dearest domestic ties should be rudely sundered, and he driven like some alien and outcast from beneath the paternal roof. The fact, that the father has thus relinquished his claims to the son's earnings, may be established either by direct evidence or be implied from circumstances; and where such relinquishment has been *bona fide* effectuated, it does not lie in the power of some prowling creditor to wrest from the son the gains he has achieved by honest industry, under the specious and covetous pretext that the property belongs to the father."

Notwithstanding emancipation, it seems the father's duty to support the child revives if the child becomes unable to support himself. *Clark v. Fitch*, 3 Wend. 463. The court said: "In that event surely she would be returned to her former situation of servant to her father." But *Johnson v. Gibson*, 4 E. D. Smith, 231, seems opposed to this. And if the emancipated child returns home sick, the father is liable for necessaries furnished him there, with his knowledge, he not objecting. *Shoalin v. Tyler*, 26 Vt. 9.

But although the father is not bound to have his child work for the benefit of the father's creditors, yet it seems that this can go no further than mere relinquishment, and that the father has no right to pay his son for those services at the expense of his creditors. Thus, in *Dick v. Grisom*, 1 Freem. Ch. 434, it was said, *obiter*: "I should much doubt whether a conveyance by a father, who was largely indebted at the time, to a minor son, in consideration of past services of the son, for which the father had agreed to compensate him, could be sustained against the creditors of the father, for in general the law considers the child as the servant of the father, and as laboring for him, and a promise by the father to pay for such services, although it might be binding on him, should, it seems to me, be regarded as purely voluntary as against his creditors. Any other rule might lead to the practice of the grossest fraud upon creditors. It would be only necessary for a debtor of doubtful solvency, having a number of minor children, to make a contract with each to pay him so much for his services, and then by way of payment, make a conveyance of his whole estate to them, and thus bid defiance to his other creditors. This would be a new mode of giving validity to family settlements." And so, *obiter*, in *Brown v. McDonald*, 1 HH Ch. 305: "I am not prepared to say that a promise to pay an infant son for his labor, by his father, who is indebted, would constitute such valuable consideration as would prevent a deed founded upon it from being declared fraudulent. For at law the father is entitled to his services, and if he give up this right, and promise to pay him for them, this, although it might be binding on him, would as against his creditors be purely voluntary, and would hardly be enough to support the deed." "If in fact a child does work and earn wages the proceeds of his labor belong to his father, and if the father invests the money so earned, in the purchase of land, taking the title in the name of the child, the father being insolvent, his creditors can subject the land to the payment of their debts." *Winchester v. Reid*, 3 Jones L. 373. "Nor can the child be benefited at the expense of existing creditors without an agreement for emancipation."

COTTON STATES LIFE INSURANCE COMPANY V. LESTER.

(82 Ga. 247.)

Insurance — payment of premiums — custom to receive on days not provided — waiver.

A life insurance company, accustomed to accept premiums on a particular policy on days later than that fixed by the policy for the payment thereby, waives any forfeiture provided by the policy for non-payment on the specified day, and is bound although the insured was fatally sick at the last payment, and the receipt for the first time contained the words, "policy-holder in good health," and the company did not know of the sickness. (*See note, p. 125.*)

ACTION on insurance policy. The opinion states the case. The plaintiff had judgment.

R. F. Lyon and Nisbets & Pierce, for plaintiff in error.

Lofton & Bartlett and S. Hall, for defendant.

JACKSON, J. This suit was brought by the guardian of the children of Mrs. Elizabeth Tufts on a policy on her life for \$3,000 taken by her for their benefit. The policy contained the stipulation that the premiums were to be paid quarterly on the 3d of August, November, February, and May of each year; and in the event of failure so to pay, then the policy to be null and void. The policy was issued in 1871, and Mrs. Tufts died in 1875. Four payments were made annually — sixteen in all — not one on the day specified, to wit: the 3d of the month. From August, 1871, to August, 1873, they were made before due — from twenty-four days to two days before due. Thence to the last premium they were made after due — from fourteen days after due to three days after due. The last premium was paid on the 17th of May, 1875. The insured died of malignant disease of the womb on the 20th of August, 1875, and had been sick for twelve months, and had been confined to her bed six months prior to her death. The last receipt had the words "and policy-holder in good health" after the word "countersigned" in the following clause thereon: "But this certificate shall not be binding on the company until the amount of the

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premium (as per margin) is paid and the receipt countersigned—G. S. OBEAR, secretary, at home office.”

The policy, their receipts, and proof of death, showing the sickness of Mrs. Tufts for some months prior to her death, were put in evidence by the plaintiff, when defendant moved for a nonsuit, which was not granted.

The court charged the jury: “That the premiums were to be paid promptly when due. Both parties were bound by this agreement, and by its terms a failure to pay promptly amounted to a forfeiture; but this stipulation about prompt payment of premiums was for the benefit of the company, and it was one which could be waived by the parties, and if the company or its officers repeatedly and for years received, without complaint, premiums after they became due, the policy-holder was authorized to consider this part of the contract as waived, and unless the last payment was delayed for an unreasonable time after it became due, and if the money was tendered to the company within the usual time after it became due, the company was bound to receive it. The health of the insured had nothing to do with the question unless there was actual fraud practiced on the company in the payment of the premium, or in the procurement of the policy, and this is not pretended by the company.

“But the defendant insists that when this last payment was made Mrs. Tufts had become dangerously ill; that this fact was not made known to the officers of the company, and that they received it on the condition that Mrs. Tufts was still in good health.

“If the company had frequently before that time received premiums after due without inquiry as to the health of Mrs. Tufts, they had no right, when the last payment was made, to put their acceptance on any condition as to her health. The premium is admitted to have been past due at that time, and if the company had given no notice until after it was too late to comply literally, that they would change their practice as to receiving past due premiums, it would be a fraud on the policy-holder now, or at the time the money was offered, to insist on terms which the policy-holder had a right to consider as waived by the company. The law requires good faith on the part of the company as well as the assured.

“If there had been such repeated waivers of time as to authorize the insured to believe it would not be insisted on, but as waived, then, before the company can return to the original terms in this

respect, it must give notice of the intended change in time to allow the insured to comply literally with the terms of the policy, and if such change has been attempted by the defendant, and such notice has not been given, then the jury should find for the plaintiff the amount of the policy with interest."

On this charge the jury found for the plaintiff, and a motion was made for a new trial on the ground that the court erred in overruling the motion for a nonsuit and in the charge. This motion was overruled and the defendant alleges error thereon.

Substantially but one question is made, and that is, does the fact that the continued habit of the company, in receiving the premiums on days different from those specified in the policy, amount to a waiver of punctual payment on the part of the company, and was Mrs. Tufts' payment on the 17th of May therefore as binding on the company as if made on the 3d of May, the day the policy required it to be made? If it had been made on that day, of course health at that time could not vitiate it. Was she authorized by the course of dealing between the company and herself to consider that the time was not regarded by them as of the essence of the contract, and that payment on the 17th was as good as if made on the 3d? If so, it did not matter whether she was sick or well on that day, because it would not have made any difference in her right to pay on the 3d, whether she was sick or well.

Death, and bad health which causes death, are the very things against which the company insures, and it would not do to allow them to refuse payment of the premium, or to predicate a defense on change of health.

The non-exaction of punctual payment of these premiums had become the habit of the company, so far as this woman was concerned. It is remarkable that during the whole four years in which she was insured she did not pay a single premium on the day fixed. For the first two years she paid four times a year before due. For the last two, she paid four times a year after due, and not one word escaped the company of warning to her of any sort.

It seems that she lived in the country, in Jones county, and was perhaps in the habit of sending her money to the company, sometimes before, at others after the day appointed for the payment, and they received it and kept it. For the last twelve months she was sick, and whilst it is not shown that the company was informed thereof, yet it made no difference in regard to her mode of payment.

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She did as she had done before she was sick at all, and after she was confined to her bed as before she was so confined.

Upon principle, we think that though time be of the essence of the contract of insurance, and punctual payments essential to their prosperity, yet they may by their conduct waive it, and thus produce such an impression upon those dealing with them that it would be unjust to permit them to invoke the principle to their aid; and that in such a case as this, when the day seems never to have been insisted upon, but payment in a reasonable time theretofore or thereafter had been always allowed, the company should be held to be estopped from engrafting on this last receipt a condition never exacted before.

The principle we lay down has been substantially decided by the courts of our sister States, and hinted at strongly, if not substantially ruled, by our own court. See 1 Big. Ins. & Ac. Cas. 406; 18 Barb. 541; 52 Mo. 469; 44 Penn. 259; 5 Otto, 326; 52 Ga. 640; 56 id. 339; 59 id. 812, and many other cases cited by counsel for defendant in error.

Indeed, the courts go so far as to hold that if Mrs. Tufts had offered this premium and it had been refused, on the 17th of May, still the company would have been bound, in such a case as the facts here make, on the ground that their habit had induced her to believe they would receive it then, and that they could not put her off her guard and take advantage of negligence or slowness rather on her part, engendered by confidence they had inspired in her. Much more when the company takes and keeps the money paid, ought it to be estopped setting up delay as a good ground to void the policy.

[Omitting minor matters.]

Judgment affirmed.

NOTE BY THE REPORTER.—In *Seamans v. Northwestern Mut. Life Ins. Co.*, United States Circuit Court, District of Minnesota, 10 Rep. 799, a life policy provided that it should "cease and determine" if the premium was not paid when due. The agent authorized to receive the premium was changed, but the company neglected to inform the insured of the change, although it had adopted a rule to do so in all cases. The insured tendered the premium in due time to the former agent, who refused it. Held, that there was no forfeiture; and could not be until a reasonable time thereafter, and that sixty days was not unreasonable. The court said: "In the present case it appears that in 1876 the company notified the assured that the Hennepin County Savings Bank, at Minneapolis, was its agent, to whom premiums should be paid. In March, 1877, the defendant appointed a new agent at Minneapolis, and when notices were in that month sent out to policy-holders, the company adopted a rule to send a circular with each notice, informing the assured of the place where, and the agent to whom payment should be made. The jury find that

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this circular was not sent to Seamans. He did not therefore know of the change of the agency, and naturally supposed he was to pay to the party to whom he had paid the year before. He sent his money in due time to that party. He did not send it to St. Paul, at which place he was informed there was an agent, because he had been notified that he must pay to the agent at Minneapolis. That the company understood it to be their duty to inform him of the change of the agency, is clear from the fact that they adopted a rule to do this in all cases, and omitted it in his case by oversight. Under the circumstances, I do not think the assured was bound to hunt for an agent in the city of Minneapolis to whom he could make payment. If he was bound to make reasonable inquiry, I think the evidence shows, that through his agent, he did so. The agent he sent to Minneapolis to pay the premium swears that he made considerable inquiry, and names several persons to whom he applied for the name and location of an agent to whom payment could be made. It is said, however, that he continued to neglect payment until the day of his death, about sixty days after the maturity of the premium. If he was excused from making payment on the day of maturity by the facts and circumstances stated, then he was entitled to a reasonable time before a forfeiture could be declared. In considering what time would be reasonable, we are to bear in mind that the company had, in fact, waived the time of payment the previous year. The jury find that in 1876 the agent of the defendant at Minneapolis informed the assured that a delay of a month or two would not work a forfeiture, and the assured accordingly paid his premium for that year nearly a month after it was due, without objection on the part of defendant or its agents. The following authorities support the general views expressed: *Ins. Co. v. Wolf*, 95 U. S. 336; *Ins. Co. v. Eggleston*, 36 Id. 573; *Ins. Co. v. Norton*, Id. 234; *Ins. Co. v. Pierce*, 75 Ill. 496; *Thompson v. Ins. Co.*, 33 Mo. 469; *Mayer v. Ins. Co.*, 33 Iowa, 304; s. c., 18 Am. Rep. 34; *Ins. Co. v. Warner*, 80 Ill. 410; *Ins. Co. v. Robertson*, 59 Id. 123." In *Insurance Co. v. Eggleston*, 95 U. S. 336; s. c., 17 Alb. L. J. 368, it was held that where an insurance company had been in the habit of notifying the assured of the time when, and place where premiums were to be paid, he had reasonable cause to expect and rely on receiving such notice, and that the company was estopped from setting up that the policy was forfeited by the non-payment of a premium of which no such notice was given. To the same effect are *Union Cent. Life Ins. Co. v. Potker*, 33 Ohio St. 459; s. c., 31 Am. Rep. 558; and *Meyer v. Knickerbocker Life Ins. Co.*, 73 N. Y. 516; s. c., 29 Am. Rep. 200. See *Prentice v. Knickerbocker Life Ins. Co.*, 77 N. Y. 493; s. c., 33 Am. Rep. 651; *Whited v. Germania Fire Ins. Co.*, 76 N. Y. 415; s. c., 32 Am. Rep. 380.

HAWLEY V. SCREVEN.

(62 Ga. 347.)

Carrier — passenger — connecting lines — baggage.

A passenger purchased of the A. & G. Railroad Company, at Savannah, a through ticket for Jacksonville, and had his trunk checked by a check marked "A. & G. Railroad." That railroad was only the first of three connecting railroads between those points. The trunk was delivered by that railroad to the second, the passenger retaining the check, and was afterward lost. *Held*, that the passenger could recover therefor of the A. & G. Railroad Company.*

ACTION for loss of baggage. The opinion states the facts. The plaintiff had judgment at the trial, and the court granted a new trial.

*See *Nashville & C. R. Co. v. Sprayberry* (8 Baxt. 341), *post*.

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R. R. Richards, for plaintiff in error.

Jackson, Lawton & Bassinger, for defendants.

WARNER, C. J. The plaintiff brought his action against the defendants as receivers of the Atlantic & Gulf Railroad Company to recover the value of a trunk and its contents, alleged to have been lost by the defendants' negligence as common carriers between the city of Savannah, Georgia, and the city of Jacksonville, Florida. On the trial of the case the jury, under the charge of the court, found a verdict for the plaintiff. A motion was made for a new trial on the grounds therein stated, which was granted by the court, and the plaintiff excepted.

It appears from the evidence in the record that the plaintiff, on the 6th of November, 1877, purchased a through ticket of defendants' agent at Savannah, for a passage by railroad from the latter place to Jacksonville, Florida, and that he paid full fare for the same; that he took passage on its cars with his trunk at Savannah for Jacksonville, the place of destination, the defendants' agent having delivered to him the customary through ticket for himself, and a brass check for his trunk marked "Atlantic & Gulf Railroad, 998." On his arrival at Jacksonville he presented his check and demanded his trunk, which defendants' agent failed to produce, and has continued to do so. The defendants proved at the trial that the route from Savannah to Jacksonville was over three different roads—the Atlantic & Gulf Railroad, the Jacksonville, Pensacola & Mobile Railroad, and the Florida Central Railroad. The Atlantic & Gulf Railroad has its terminus at Live Oak in that direction. The train of the A. & G. railroad went to Live Oak where its engine was detached, and the rest of the train went on, drawn by the engine of the J. P. & M. Railroad, and the conductor of the latter road receipted the conductor of the A. & G. Railroad for thirteen pieces of baggage at Live Oak as being in good order, checked as follows, etc., including 998, the number of the plaintiff's check. The defendant sought to protect itself from liability for the loss of the plaintiff's trunk as a passenger on its road, under two decisions made by a majority of this court in *Baugh v. McDaniel & Strong*, 42 Ga. 641; *E. T. & G. Railroad Company v. Montgomery*, 44 id. 278, giving a construction to the 2084th section of the Code as to the liability of a railroad company in this State

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for the loss of goods beyond the terminus of its own road, and the only question made in the case now before us is one of law. If the defendant was liable under the law for the loss of the plaintiff's trunk when applied to the facts contained in the record, then the verdict was right, and the court erred in granting a new trial. The two cases cited and relied on by the defendant do not necessarily control the decision of the court in this case, which is a suit by a passenger for the loss of his baggage as such passenger, for which he held defendant's check, which was evidence of a contract of some sort at least, and the jury have found under the evidence that it was a contract on the part of the defendant to transport safely the plaintiff's trunk, either by itself or competent agents, from Savannah to Jacksonville, the place of destination, and in our judgment that finding was in accordance with the law. There is no evidence going to show that the defendant offered to deliver to the plaintiff his trunk at Live Oak and demanded its check therefor at that place, which goes to show what was the construction put upon the contract by both parties, as evidenced by the check delivered by the defendant's agent to the plaintiff. In view of the facts as disclosed in the record, and of the law applicable thereto, the court erred in granting a new trial.

Let the judgment of the court below be reversed.

Judgment reversed.

WELDON V. COLQUITT.

(92 Ga. 449.)

Sunday — criminal inquiry on — bail on.

In a time of peace and order it is illegal to hold a court of criminal inquiry on Sunday, but bail may lawfully be taken on that day.*

ACTION on bail bond. The opinion states the case. The plaintiff had judgment below.

F. B. Hodges and Samuel Lumpkin, for plaintiffs in error.

Seaborn Reese, solicitor-general, for defendant.

* To same effect, *Hammons v. State* (59 Ala. 164), 31 Am. Rep. 12.

BLECKLEY, J. On Sunday, the 21st of October, 1877, during divine service at a country church in Hart county, four men, residents of South Carolina, behaved in a violent, boisterous and disorderly manner, disturbing the congregation and causing it to break up and disperse. In the midst of the disorder a constable, who happened to be present, arrested them. One of them escaped. The constable conducted the other three before a justice of the peace, procured a warrant, and then detained them under the warrant, entering their arrest thereon. They were intoxicated, were without counsel, and could not procure any, but insisted upon being tried at once. The trial was commenced late in the afternoon, and was concluded after dark. It took place at the residence of the justice of the peace, which was about half a mile from the church and some nine miles from Hartwell, the county town. The State was represented by an attorney at law, and the prisoners had the assistance of a non-professional friend. Twenty-three witnesses were examined, ten for the prosecution and thirteen for the defense. The costs of the proceeding, as registered on the warrant, amounted to \$37.80. At the close of the investigation the presiding magistrate passed and signed officially an order in the following terms: "After hearing the testimony of the parties on both sides it is held by the court that there is probable cause of the guilt of the within charge against the prisoners, and it is ordered by the court that the defendants give bond and security in terms of the law, or be committed to the jail of said county, this 21st day of October, 1877." One of the prisoners, Taylor, gave bond accordingly in the penal sum of eighty dollars, for his appearance at the Superior Court to answer for the offense, with Weldon and Boleman as bail. The bond was delivered on the day of the arrest and trial, about nine or ten o'clock at night. It bore the same date as the order of commitment, and recited that order as well as the arrest. Afterward, in the Superior Court, a bill of indictment was preferred and found against Taylor for the offense, under section 4574 of the Code, and on his failure to appear a judgment *nisi* forfeiting the bond was rendered. A *scire facias* issued and was served upon the bail only, a return of *non est* being made as to the principal. The bail pleaded to the *scire facias*, first, that the bond was illegal and void because made and delivered on the Sabbath day; and secondly, that both the judgment of the magistrate requiring the bond and the bond itself were illegal and void, because there was no necessity

or other good reason for holding the court of inquiry on the Sabbath day, and the holding of the same was not a work of necessity or charity, but was an exercise of the ordinary business or calling of the magistrate.

At the trial a verdict for the amount of the bond was had against the bail, and they moved for a new trial, the overruling of which motion is the subject of the present writ of error. Several grounds were contained in the motion for a new trial, but they nearly all had relation to the alleged invalidity of the bond as a contract made on Sunday, under the circumstances above narrated, which circumstances, with some amplification of the particulars, appeared in evidence. The question is, was the bond valid or invalid?

1. In Georgia, as in England, Sunday is a holy day. The Code denominates it the Lord's day, and as the Lord's day all courts and magistrates are to consider it. This they are to do as matter of mere law, irrespective of religious obligation and duty. On it there can be performed no judicial labor which does not come fairly within the description of works of necessity or charity. Sunday is no day for trial and judgment, being by the common law *dies non juridicus*. The mere act of receiving a verdict on Sunday, which the jury are ready to deliver, is illegal. 49 Ga. 436. The current of decision by this court has been pro-sabbatic in full measure, and with that current runs, we think, the true law, as well as the general moral sentiment of the people of the State. Courts, high or low, are no less bound to abstain from ordinary labor on the Sabbath day than are private individuals. In a time of peace, and when the magistrates of the country are not overwhelmed with police business, to an extent rendering it impracticable to dispatch the same without encroaching upon the Sabbath, a court of inquiry cannot be begun and held on Sunday for the examination and commitment of offenders, not even of Sabbath-breakers, rioters or disturbers of public worship. Warrants may issue and arrests be made, but examination and trial cannot be commenced until Monday. In the record before us there is no trace of any necessity, physical or moral, which made it incumbent upon the magistrate to disregard the legal restraints appertaining to the Sabbath, and engage in the exercise of judicial functions on that day. Doubtless he supposed himself to be in the line of duty, but he was mistaken. All he did judicially in the premises was absolutely void, and in strict law he was himself amenable to the penalties of section

4579 of the Code, as a violator of the Sabbath day, the holding of courts of inquiry being a part of his ordinary calling as a judicial officer.

2. The warrant and arrest were however legal. Taylor was in lawful custody, and was as effectually a prisoner and deprived of his liberty as if he had been in jail. Had he been in jail he might have been legally delivered on bail, though it was Sunday. 55 Ga. 244.

It is lawful to take a bond on Sunday, admitting a prisoner to bail, the same being in favor of liberty, and in the nature of a work of charity to a human being in distress. The place or the mode of his confinement, so that he be in actual legal custody, is not essential. See 31 Ill. 469.

3. The mere fact that the bond was taken on Sunday did not vitiate it. The bond recites, however, the void order of commitment passed by the magistrate, and the evidence, fairly construed, shows that the decision embodied in that order was in fact an inducement to the giving of the bond. The bond was made and delivered, not only because of the warrant and arrest, but because the judgment of the magistrate required it as a condition of keeping out of jail. That judgment was certainly valid or invalid. If valid, it would go to uphold the bond; and if it was invalid (as we have pronounced it), it had no binding force, and compliance with it was wholly voluntary on the part of the prisoner. He accepted and complied with it when he was under no obligation to do so. Thereby he recovered his liberty, and that was the main end in view, and was of itself a sufficient consideration for his contract. If the giving of the bond had left him in *statu quo*, that is, still in custody, and its only effect had been to keep him out of jail, the bond would have been equally void with the magistrate's order; but as may be fairly inferred from the evidence, he not only kept out of jail, but was freed from the imprisonment in which he was held by the officer under the warrant. Doubtless he was restored immediately to full liberty. Though a void judgment be some part of the inducement to a contract, yet if the contract would be valid and obligatory had no judgment been rendered, the contract is not made void by the nullity of the judgment. Thus, where a prisoner in the custody of an officer under a warrant insisted upon being tried on the Sabbath day, and was tried by the magistrate accordingly, and was ordered to give bail or stand committed to jail,

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though the order was void, the bond was good as a voluntary obligation, inasmuch as the prisoner had a right to dissolve the arrest by giving bail (the offense being bailable) without the compulsion of any order or judgment whatsoever. To insist on a hearing upon Sunday, and to obtain it and then give bail, is to waive a legal hearing; and waiver is permitted by the Code, §§ 10 and 4743.

[Omitting minor considerations.]

Judgment affirmed.

 COGGIN V. CENTRAL RAILROAD COMPANY.

(88 Ga. 686.)

Master and servant — negligence — injury by railway company to servant of telegraph company.

The plaintiff, while engaged in the employ of a telegraph company in distributing poles along the line of a railway, and while upon a train on such railway, was injured by the negligence of the railway company's engineer upon the train. The train, in pursuance of a contract between the companies, was transporting men and materials of the telegraph company. The train was manned by employees of the railway company, but was temporarily under the direction of the foreman of the telegraph company. *Held*, that the plaintiff could recover of the railway company.*

ACTION for personal injury. The opinion states the facts. The defendant had judgment below.

On May 10th, 1870, plaintiff was in the employ of the Western Union Telegraph Company, distributing poles between Macon and Atlanta, and was on one of defendant's railway trains which was carrying the poles to be distributed. He received an injury caused by the carelessness of the engineer in taking up the "slack" of the train. He was engaged at the time in throwing off the poles. The engine started without giving any signal, and in taking up the "slack" of the train it jerked him between the cars, and he was injured. Awtry had charge of the hands of the telegraph company, and he was on the engine at the time of the accident. The train was manned by hands of the railway company, the conductor

*Compare *Cunningham v. International R. Co.* (61 Tex. 508), 22 Am. Rep. 633.

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regulating the speed according to Awtry's directions. By contract between the two companies, the train was transporting the men and materials of the telegraph company. Awtry directed the conductor as to the speed. The defendant had judgment below.

Marshall J. Clarke, Bacon & Rutherford, and E. F. Best, for plaintiff in error.

R. F. Lyon, for defendant in error.

BLECKLEY, J. 1. It may be doubted whether there is any way for a chartered railroad company, without special permission by statute, to let out one or more of its locomotives and cars to be run by steam upon the railway track of the corporation, and withdraw itself from responsibility for care and diligence in the manner of running. The charter privileges are granted by the corporation, and in accepting them it assumes the correlative obligations. One of the latter, and a very important one where steam-power is employed, is the use of due care and diligence to guard against injury to person or property. When the corporation chooses to part temporarily with the direct control of some of its dangerous machinery, does it sever itself from the consequences of the negligent management of that machinery upon its own road, on the part of those to whom it has, for the time being, intrusted the control? Are these latter substituted in place of the company as to measures of redress; and is the security afforded in other cases by the capital and resources of the company cut off from a party thus injured? Compare 49 Ga. 355, with 46 Id. 417. The facts of the present case, however, do not render any decision upon this point necessary.

2. As between the two companies, whose servant was the engineer? Was he the servant of the railroad company, or of the telegraph company? If the former, and if he was negligent, and if his negligence caused the injury, his master must respond. He was employed by the railroad company, was in its pay, subject to be discharged by it, and was running its locomotive and its cars upon its track. The work in hand was the transportation and distribution of poles for the telegraph company. All the operatives, the plaintiff included, except the engineer and the conductor, were servants of the telegraph company, and one of these servants represented the latter company in supreme command. The progress and the pauses of the train were governed by his orders. When to

start and stop, and how fast to move were matters for his regulation. His place, however, as it would seem, was not upon the locomotive but upon the cars. Most probably his wishes were signified to the conductor, and by the conductor to the engineer. It is probable, moreover, that his instructions, (especially as to speed, were general and uniform, delivered once for all, and not in a constant flux of change or flow of repetition; more resembling, it may be supposed, established law than a series of special providences. His concern was mainly with results, and his supervision of means involved nothing beyond seeing that the poles reached their proper places on the roadside in due time and manner. There is no evidence that he interfered or had a right to interfere with the application of steam, or with manipulating the engine. These were for the engineer as an expert — as a craftsman skilled in his business. Certainly, to say the most, the connection of the two was not closer than that of pilot at the wheel and engineer at the throttle; and if so, the actual handling of the engine was exclusively for the engineer. Whatever the engineer did by the command of the telegraph company's superintending agent was not, we may concede, fault or negligence in the engineer. If there was an order to jerk, or to take up the slack too fast, or otherwise to misapply the power of the engine, obedience to the order may not have been matter for complaint by any servant of the telegraph company on board. But orders to move at a given speed, to stop and to start, include in themselves by implication a further order to do these things in a proper manner, unless some particular manner is expressed. To cover unusual jerks, or unsafe slacking, or other hazardous freaks by orders, it is necessary that the orders should clearly embrace them. Any possible doubt should go against such a construction of orders; for it is not to be intended that any but ordinary and proper means are contemplated when an order to move, stop or start, is given. Whether the engineer was in fact negligent, and whether, if he was, that negligence caused the injury sued for, ought to be left open as mere matters of fact to be determined by a jury on the new trial which it is our purpose to award; but in law, that he was the servant of the railroad company in respect to the negligence with which he is charged we have no doubt. Though he was subject to certain orders from the telegraph company, these orders did not extend, and it was not contemplated that they should extend, to the details of his vocation, to the mat-

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ters of art and skill which his duty involved. As to these, his orders are to be looked for in the laws of the land, and the rule of diligence which they impose is the rule by which his diligence is to be measured; and for that degree of diligence on his part the railroad company was responsible. We see not why that responsibility would not hold as between the two companies themselves. If the property of the telegraph company had been damaged by the same acts of negligence which are now complained of by the plaintiff, or if the latter company had been a natural person and had received the wounds and bruises which the plaintiff received, what, in either such case, would have hindered a successful action by the telegraph company against the railroad company? If you hire from me the services of my skilled servant for a given occasion, and while about the business he uses his skill negligently, and thereby you are damaged in property or person, am I not answerable? And will your presence and my absence make any difference in my liability, if you have done nothing which you ought not, nor omitted any thing which you ought, to have done? And we take it that under the circumstances of the present case, the servants of the telegraph company were no less than the company itself under the protection of law against the engineer's negligence, if they were rightfully upon the cars. The engineer's services were not performed separately from the labor of these servants, but in connection with it; and this doubtless was contemplated in the contract, whatever that was, between the two companies. You and I, let it be supposed, are carrying on, each his own business, upon the same premises, I in my shop, and you in the open air beside it. Wanting work done in my line, it is arranged between us that you are to send a force of common laborers with a general superintendent of the operations, and that I will furnish all the implements, with an expert to use such of them as require special skill in handling, and that by the co-operation of all these, the work is to be executed in my shop. We both know, and the laborers know, the execution of such work is attended with peril rather more than ordinary, and that the degree of this peril depends chiefly on the skill and diligence of my expert. The work is entered upon; the superintendent is faultless; the laborers are all faultless; the expert alone fails in duty, is negligent in the use of his skill and by reason of his negligence, one of the laborers is physically injured: am I not liable? My servant, while in my employment about my business, in my

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shop and with my tools, has negligently injured your servant engaged with him on the same general work; the skilled man on whose fidelity the safety of operations mainly depended, has proved derelict, and a common laborer at work on a plain part of the job has been crippled or otherwise wounded. Is the laborer to be without remedy, or turned over for redress to the expert alone? Rather is not his negligence my negligence also? Being his master, and his wrongful conduct having occurred while acting within the scope of his employment, am I not bound with him and for him? Code, § 2961. While no case exactly analogous to the one at bar has been brought to our attention, and we have found none precisely in point, the principle which controls it is ruled or recognized in the following authorities. El. Bl. & El. 899; 6 M. & W. 499; Wood Mast. & Servt. 630 *et seq.*; Whart. on Neg., § 177 *et seq.*; Shear. & Redf. on Neg., §§ 73, 74; Story on Agency [8th ed.], §§ 453 *a*, 453 *b*.

[Omitting minor matters.]

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

GERMAN NATIONAL BANK V. MEADOWCROFT.

(95 ILL. 134.)

Trover — for grain mixed with other — National bank — ultra vires.

Trover lies for grain consigned to a public ware house, and there mingled with other grain; and where the owner of the warehouse transfers the warehouse and such contents to a National bank, to secure a debt, the latter must respond to such consignors for such grain, irrespective of its chartered authority.*

TROVER. The opinion states the case. The plaintiff had judgment below.

Tenney & Flowers, for appellant. 1. Corporations can exercise only such powers as are expressly conferred on them, and such implied powers as are necessary to enable them to perform their prescribed duties. *Vandall v. San Francisco Dock Co.*, 40 Cal. 83; *Bellmeyer v. Ind. Dist. of Marshalltown*, 44 Iowa, 564; *Weckler v. First Nat. Bank*, 42 Md. 581; s. c., 20 Am. Rep. 95; *St. Louis v.*

*See *Rich v. State National Bank of Lincoln* (7 Neb. 301), 20 Am. Rep. 332.

Weber, 44 Mo. 547; *Matthews v. Skinker*, 62 id. 329; s. c., 21 Am. Rep. 425.

Corporations are not responsible for the unauthorized and unlawful acts even of their officers, although done *colore officii*, and if the tortious act arises in a matter which is foreign to the objects and purposes of the corporation, and beyond its powers, express or implied, it cannot be held liable. *Angell & Ames on Corp.*, § 311, n. 4; 2 Dill. on Mun. Corp. 877; *City of Chicago v. Turner*, 80 Ill. 419; *Board of Trustees v. Schroeder*, 58 id. 353; *Howe v. Mayor, etc. of Baltimore*, 30 Md. 218; *Eastman v. Meredith*, 36 N. H. 278; *Mayor, etc., v. Cuntliff*, 2 Comst. 165; *First Nat. Bk. of Manhattan v. Citizens' Bank of Topeka* (U. S. Cir. Ct.), 21 Int. Rev. Rec. 382; *Indianapolis, etc., Ry. Co. v. Anthony*, 43 Ind. 183; *Brokaw v. N. J. R. R., etc., Co.*, 32 N. J. L. 328; *Wiley v. First Nat. Bk. of Brattleboro*, 44 Vt. 546; s. c., 19 Am. Rep. 122; *Hood v. N. Y. and N. H. R. R. Co.*, 22 Conn. 1 and 502; *First Nat. Bk. of Lyons v. Ocean Nat. Bk.*, 60 N. Y. 278; s. c., 19 Am. Rep. 181; *Scott v. First Nat. Bank of Chester Valley*, 72 Penn. St. 471; s. c., 13 Am. Rep. 711; *De Haven v. Kensington Nat. Bank*, 81 Penn. St. 95; *Vanderbilt v. Richmond Turnpike Co.*, 2 Conn. 479; *Sturges v. Keith*, 57 Ill. 451; s. c., 13 Am. Rep. 28.

2. Where grain has been received into a warehouse and placed in a common bin, and mixed with the grain of other persons, and lost its identity, the owner has parted with his property in it, and that the receipt issued to him does not represent his grain. *Bailey v. Bensley*, 87 Ill. 556; *Seymour v. Wyckoff*, 10 N. Y. 213; *Chase v. Washburn*, 1 Ohio St. 244; *Newton v. Woodruff*, 2 Comst. 153; *Hurd v. West*, 7 Gow. 752; *Ewing v. French*, 1 Blackf. 353; *Smith v. Clark*, 21 Wend. 83; *Buffum v. Merry*, 3 Mas. 478; *Lonergan v. Stewart*, 55 Ill. 44; *Rahilly v. Wilson*, 3 Dill. 420; *Johnson v. Brown*, 37 Iowa, 200; *Dillingham v. Smith*, 30 Me. 370; *Loomis v. Green*, 7 Greenl. 386; *Lupton v. White*, 15 Ves. 432; *Scudder v. Wooster*, 11 Cush. 573; *Hutchinson v. Hunter*, 7 Barr, 140; *Golder v. Ogden*, 15 Penn. St. 528; *Waldo v. Belcher*, 11 Ind. 609; *Merrill v. Hunnswell*, 13 Pick. 213; *Young v. Austin*, 6 id. 279.

Barker, Buel & Barker, for appellee.

WALKER, C. J. It appears from the transcript in this case that one Runyan, about the 10th day of July, 1876, being indebted to

German National Bank v. Meadowcroft.

the German National Bank of Chicago, conveyed to Herman Schaffner, its cashier, in trust for the bank, a public warehouse for grain in the city, known as "Runyan's Elevator;" that afterward, about the 1st day of November of that year, the bank, through its agents, took possession of the warehouse, in which there was at that time 18,000 or 20,000 bushels of barley stored for different persons. Appellee held warehouse receipts for a trifle over 6,000 bushels of this grain, which had been issued for grain actually stored therein.

These receipts contained an agreement by the owner that the grain therein mentioned might be stored with other grain of the same grade or quality, by inspection. It is conceded that this grain was thus stored. And it is found by the Appellate Court that at the time the bank took possession there was a sufficient quantity of grain in the warehouse to meet all the outstanding receipts. The bank, when it took possession, placed one Stokes in charge, and he at once began to receive grain, and placed the same in bins with other grain in store and issued warehouse receipts, and he delivered grain therefrom.

In the following December appellee tendered to Stokes the warehouse charges due for storage and demanded of him the barley represented by his receipts, but he refused to make such delivery. Appellee thereupon brought this action of trover in the Circuit Court of Cook county. The general issue was filed, and a trial by the court and jury resulted in a verdict in favor of appellee for \$3,134 against the bank, but the other defendants were found not guilty.

A motion for a new trial having been overruled, judgment was rendered on the verdict. The bank appealed to the Appellate Court, where the judgment was affirmed, and the case is brought to this court and errors are assigned on the record.

All questions of controverted fact having been found by the Appellate Court we can only consider questions of law arising thereon. Appellant claims, that conceding the facts to be true as found by the jury and the Appellate Court, still appellee is not entitled to recover, and the judgment should therefore be reversed.

It is contended by appellant that the action is misconceived; that a recovery cannot be had in trover; that when the owner consents that his grain shall be commingled with other grain in such a manner as to lose its identity, he cannot recover for its conversion. This would no doubt be true if a recovery should be sought by an

action of replevin, not because the ownership of the property is changed, but because the sheriff could not deliver it to plaintiff.

To maintain trover it has never been held that the property must even be in existence, much less that it shall be capable of being identified and separated from all other property of the same character. No one surely will contend that merely by proving that the defendant had destroyed the property, or so changed it that its identity was lost, a recovery would be defeated. Whatever effect such proof might produce in replevin, it surely would be no defense to an action of trover.

Suppose two persons were by consent to mingle their grain, and one were to sell the entire quantity, could it be maintained that the other owner had no action to recover for the loss, or that trover would not lie against the seller or the buyer? It is perfectly apparent that he might maintain trover. By the intermixture neither would lose his legal title to the property, as that undeniably remained as it was before. The only change which that would produce is that of the difficulty of identity with a change of the rights as to possession.

If two persons were the joint owners of a specific chattel and one were to sell it and convert the proceeds to his own use, will it be contended that the other joint owner could not sue in trover and recover damages for the loss of his half? Trover being for the recovery of damages sustained by the plaintiff, for the conversion of his property, it cannot matter whether he holds the property thus converted jointly with another or in severalty. His right of property in either case is the same, and the damage he sustains is not different, and reason and justice require that the means of obtaining his rights should be the same in either case. Nor are we aware of any technical rule which prohibits it.

If, however, we refer to authority, it will be found to fully support these views. In *Chitty on Pleading*, p. 167, it is said the action lies against any person who had in his possession, by any means whatever, the personal property of another, and sold it or used it without the consent of the owner, or refused to deliver it when demanded. And it has been held that a person owning property mingled with that of another may on its conversion, maintain the action. See *Jackson v. Anderson*, 4 Taunt. 24; *Whitehouse v. Frost*, 12 East, 614. And in the cases of *Benjamin v. Strimple*, 13 Ill. 466, and *Boyle v. Levings*, 28 id. 314, it was held that one ten-

ant in common of a chattel may maintain trover against the other tenant in common, where he has converted the property to his own use. This right was held to be given under the statute, but it only enlarges the common-law right.

We are therefore of opinion that even if it can be said that appellee held a third interest in this grain in common with the other holders of receipts, that would be no impediment to his maintaining the action.

Nor does the case of *Bailey v. Bensley*, 87 Ill. 556, infringe this rule. In that case the questions involved were between the commission merchants and their consignor. He had shipped grain to them, to be sold when he should so order. When they sued him for a balance for advances, commissions, and charges paid for storage, one of the objections raised by him was, that on receiving receipts for grain he had consigned to them, with directions to hold it, they had sold and transferred the warehouse receipts given when his grain went into store, and that when he ordered them to make sales they furnished and sold other receipts representing the same quantity and grade of grain as he had stored, and for which the receipts had been given. But it was held that this being according to usage on the board of trade, it was unobjectionable.

It was also said that "we do not see how, as appellant claims, the warehouse receipt can be regarded as the property, or as representing the property, of the consignor, on account of the receipt of whose grain it issued, so that the parting with such particular receipt is a disposal of the consignor's property. The grain, on being received at the warehouse, is stored in common bins, mixed with other grain, and loses its identity, and becomes incapable of specific designation; that amount of grain is credited to the consignee. The warehouse receipt is given to the consignee as his voucher that he has in that warehouse, not the grain of the consignor, nor any particular grain, but a certain number of bushels of grain of the kind and grade mentioned in the receipt, subject to his order and disposal. The consignor is not named in the receipt. It does not represent his particular property. It is not issued to be used by him. For his protection and voucher he may be supposed to have a railroad receipt on shipment, and the acknowledgment of the consignee of the receipt of the grain."

Here, the court was not discussing what legal right the holder of the receipt has, but what claim the consignor has on his consignee,

to whom the receipt was given, and which had never been delivered to the consignor, so as to vest title in him of any specific property or any number of bushels of the entire mass with which it was mingled. Had the consignee returned the receipt to the warehouseman and demanded the delivery of the grain, the latter could not have been heard to say the consignee was not the owner of that number of bushels of grain to be taken and separated from the great bulk of grain of the same grade. He would not have been entitled to the very same grain he stored or placed in the warehouse, but to other similar grain. So it would have been had the consignee given the receipt to the consignor, and he had made the tender and demanded the grain for which the receipts called.

In that case it was also said that as two receipts for precisely the same amount and grade of grain were equivalent, it did not matter whether the consignee delivered the very same receipts he received when the grain went into the warehouse, or others for the same quantity or quality and grade. On presenting either he would not have received the same he stored, as it would have been impossible to have delivered the very same grain that was received. So that as between him and his consignor, he had no right to demand the identical receipt that was issued when his grain passed into the warehouse -- that any other receipt issued by the same warehouseman for a like number of bushels of the same grade would answer the same purpose, when the consignee wished to sell or withdraw the amount, as the original receipt. Either receipt invested him, when delivered to him, with the legal title to that amount of grain of the same grade, which he could undeniably have demanded, and on paying the charges, if refused, he could maintain an action of trover and recover damages for its conversion.

It is true that this grain was delivered to Runyan and the demand was made of Stokes. But Runyan was compelled to sell the warehouse to pay indebtedness to the bank. He conveyed to Schaffner to hold in trust for the bank, and was compelled to deliver possession to the purchaser. And as he was not permitted to remove the grain he had received into the warehouse, except under circumstances not claimed to have existed, without committing a felony, he had no choice, but was compelled to surrender the possession of the grain with the elevator. Nor did Stokes, the bank or any other person, acquire any title, claim or lien on the grain then in the warehouse, the possession of which was delivered with

it. But they, by receiving it, became as mere substituted bailees in the place of Runyan, and became charged with the same duties to the owners, and were bound to deliver it precisely as would Runyan had he been in possession. And this duty manifestly devolved on Stokes or the bank. A failure to deliver the grain, then, rendered one or the other liable to respond in damages.

It is insisted for the bank that its charter does not authorize it to engage in or carry on the business of warehousemen; that its charter only authorizes it to do a banking business, and the receipt, storage and otherwise handling grain as a warehouseman is *ultra vires*, and it cannot be held liable. The jury by their verdict, and the Appellate Court by affirming the judgment of the Circuit Court, have found that the bank has converted this grain to its own use; that it has appropriated appellee's property and deprived him of it, to the amount of the verdict, and that this was wrongfully done. And shall the bank be heard to say, that although it has appellee's property which it refuses to surrender to him, and has converted it to the use of the bank, and because it was obtained by the performance of acts not authorized by its charter, the bank will hold it and refuse to account for it or its proceeds? Such cannot be the law. Suppose a person to make a special deposit in a bank of a sum of money, and the envelope should be broken, the money taken and placed with the funds of the bank and its profit account credited by the amount, and it should be paid out in the course of its business, could the bank, when sued, escape liability by saying that the bank is not authorized to receive special deposits for safe-keeping only, and the act was *ultra vires*? We presume no one would contend for such a defense. And it may be asked, in principle how does the case at bar differ from the one supposed? In such a case the bank would have received money and appropriated it to which it had no claim, nor should it be permitted to hold it because it was wrongfully obtained.

The question is, not whether the bank was acting under and in conformity to the provisions of its charter in receiving and forwarding grain, but whether the bank has wrongfully converted appellee's property to its own use. If, as the jury have found, the bank has, then it does not matter whether the wrong was perpetrated whilst the bank was in the pursuit of its legitimate business or was acting against the provisions of its charter. The wrong to appellee is the same in the one case as in the other.

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It can be no defense to say the bank obtained and converted appellee's property contrary to the provisions of its charter. The wrong is the same, and it cannot matter in what manner the wrong was perpetrated, as the liability is the same. It is the wrong, and not the manner in which it occurred, that we have to consider. It is not a defense for the bank to say, we received and converted the grain and held the money without claim of right, but as when we converted the property we were acting beyond the limits of our charter, you cannot recover. The bank committed the wrong and is liable.

Perceiving no error in this record, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

TURNER V. PEORIA AND SPRINGFIELD RAILROAD COMPANY.

(95 Ill. 134.)

Negotiable instruments—receivers' certificates.

Certificates of indebtedness issued by a receiver are not negotiable instruments.

ACTION on a receiver's certificate of indebtedness. The opinion states the case. The defendant had judgment below.

S. D. Puterbaugh, for appellants. A receiver's certificate is negotiable, and when payable to bearer is transferable by delivery and possesses all the ordinary attributes of negotiable instruments. The purchaser of such a certificate, like the purchaser of a municipal bond, is put upon inquiry as to two points: 1, as to whether there has ever been authority of law by which the certificate has been issued; and 2, as to whether the certificate has been issued by the proper officials and within the scope of their authority. Having ascertained these two points he is bound to go no further, if the face of the certificate shows that it is valid. 2 Coler on Mun. Bonds, 134; *Bissell v. Jeffersonville*, 24 How. 287; *Comrs. of Knox County v. Aspinwall*, id. 540; *Rogers v. Burlington*, 3 Wall. 754.

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B. S. Prettyman and Hughes & Bloomfield, for the Peoria and Springfield Railroad Company.

L. W. James and Hopkins and Morrow, for the bondholders and appellee.

SCOTT, J. Many of the principal facts contained in this record appear by stipulation of the parties. On May 22, 1875, under a bill filed by a bondholder, the Peoria and Springfield Railroad Company was placed in the hands of a receiver, who, under the direction of the court, took possession of all the property of the company.

Application was made to the court, by the first receiver appointed, for leave to borrow money with which to make needed improvements indispensable to the preservation of the property and to the profitable running of the road, which was granted, and the receiver authorized to borrow a sum of money, not exceeding \$20,000, for the purposes named in the order of the court, to be paid out of the earnings and proceeds of the property after first paying the operatives and employees of the road.

Afterward, on the 22d day of June, 1875, by another order of the court, the receiver was authorized to borrow \$34,646, including the \$20,000 specified in the previous order, to be by him expended for the purposes, and no other, expressed in the order of June 14, 1875, and in his concurrent application, for a period of not less than one nor more than five years, with interest not exceeding ten per cent per annum, and for which he was authorized to issue to the person or persons from whom he should borrow the money his certificate as such receiver, the form of which was prescribed by the court, and that it should express on its face, to whom it was issued, on what account, and that it was issued by order of the court,—a copy of which order was required to be printed on the back of the certificate.

The money to be borrowed by the receiver under this order was to be a first lien on the income, revenues and earnings of the railroad company after deducting therefrom the operating expenses, and on all other property of the company, real and personal. It was made the duty of the receiver from time to time to report his acts and doings to the court, and so soon as he should borrow any money to report to the court the person or persons from whom it

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was obtained, the time of payment, and the rate of interest to be paid.

On the resignation of the first receiver another one was appointed by the court, who was required to give bond in the sum of \$50,000, conditioned for the faithful performance of his duties as such receiver.

It was made to appear that the indebtedness incurred by the first receiver remaining unpaid amounted to about \$100,000, and that the receiver just appointed was unable to meet such indebtedness from the current earnings of the road, and thereupon it was ordered by the court that the receiver issue certificates of indebtedness for any outstanding valid indebtedness of the late receiver, or to borrow a sufficient sum of money with which to pay such indebtedness, on such time as he should deem proper, not exceeding two years, and at a rate of interest not exceeding ten per cent per annum, payable semi-annually.

The amount of such certificates was limited to the present indebtedness of the late receiver, and was not to exceed \$100,000, and to be used for the purpose of liquidating such indebtedness, and for no other purposes. The form of the certificate the receiver was authorized to issue was prescribed. It was to be made payable to the party to whom it was to be delivered, or his order, and a copy of the order of the court authorizing the issuing of such certificates was required to be printed on the back thereof.

On the 7th of October, 1878, Archibald Turner and Joseph S. Decker filed their intervening petition in the original cause wherein the receiver had been appointed, in which they represented to the court that they were the *bona fide* holders of a certificate of indebtedness issued by the second receiver of the effects of the railroad company, dated November 20, 1877, payable on or before the 20th day of August, 1878, for the sum of \$5,000, payable to B. E. Smith, or bearer, and that such certificate was issued on account of indebtedness incurred by the former receiver under the order of the court rendered in the principal cause. Petitioners state the manner in which they became the holders of such certificate; from which it appears that Benjamin E. Smith, the payee named in the receiver's certificate, was indebted to them in the sum of \$6,500, for which they held his protested checks. At this time petitioners were pressing Smith for payment, when he represented to them that his draft on the manufacturing firm of H. R. Smith & Co.

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would be good. Thereupon it was agreed that petitioners would accept Smith's draft on H. R. Smith & Co. at sight for \$4,900 and advance him \$3,400 in cash, which they did, and give him credit with \$1,500 balance when paid on his indebtedness to them, which draft for \$4,900 was to be and was secured by the transfer to them of the receiver's certificate mentioned, as collateral. The draft Smith gave petitioners on the firm of H. R. Smith & Co. was protested and was never paid. Some further changes in the securities were made, but the indebtedness for which the certificate of the receiver was pledged as collateral security was never paid, and by reason of such default petitioners demand payment of the certificate held by them, and, having filed their petition for that purpose, ask an order upon the receiver of the railroad company to pay them the amount thereof out of funds in his hands properly applicable thereto.

An answer by the acting receiver was filed denying the allegations of the petition. The cause was then referred by the court to the master in chancery to take proofs and report his findings thereon. The master reported on the facts proven, about which there does not seem to be any considerable disagreement, his conclusions, as follows:

"1st. That the receivership has received no benefit whatever from said certificate, and that no part of it went to the payment of the indebtedness of the former receiver of this court.

"2d. That the receiver had no power or authority to dispose of certificates save in the manner and for the purposes expressed in the order of the court set out on the back of the certificates; that neither Mr. Smith nor the petitioners were creditors of the former receiver, and that neither of them paid the receiver any money or other property that could be by him used in the payment of debts of the former receiver. Nor did the said certificate go to the reduction of such indebtedness in any way or manner. Hence the object of the order was in nowise carried out.

"3. I find that the authority of Mr. Hilliard to borrow and receive money and issue certificates therefor could not be delegated to another, so as to bind the fund in court.

"4th. I find that these certificates of indebtedness are not negotiable instruments in the sense which will cut off equities or defenses as against innocent holders for value, but that the same, even in the hands of *bona fide* purchasers without notice, are sub-

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ject to the same equitable defenses which would exist between the original parties thereto.

"5th. This certificate in form was a certificate of indebtedness payable to B. E. Smith, and petitioner dealt with him as the owner thereof. Certainly Mr. Smith could not enforce its payment,—having paid nothing therefor, he had no title and could grant none."

As the exceptions taken to the master's report relate more to his conclusions drawn from the evidence than to matters of disputed fact, it will not be necessary to note them to an understanding of the case. The Circuit Court disallowed the claim, and on the appeal of petitioners to the Appellate Court for the second district, that decree was affirmed. The case comes now to this court on the appeal of petitioners.

Under the facts there can be no pretense, had the claim been presented by the payee named in the certificate, that he would have been entitled to have it paid out of any funds in the hands of the receiver. It was not issued to him on account of any indebtedness incurred by the former receiver, nor did the receivership receive the slightest benefit from him or any one else for the transfer of the certificate. Unless therefore the holders occupy the position, with reference to this certificate, of innocent assignees of negotiable or commercial paper, either under our statute, or at common law, under the law merchant, it follows that whatever equitable defenses would prevail as to the original payee would prevail as against them.

[Omitting other considerations.]

But the decision may be placed on broader grounds, viz. : that the certificate of the receiver, held by the intervening petitioners, is not commercial paper, and is not such an instrument as is assignable at common law or under our statute. Commercial or negotiable paper, either at common law, or under our law as declared by statute, has been so often defined that no extended discussion is necessary. An old case, declaring what instrument or writing constitutes a good bill of exchange according to the law, usage or custom of merchants, is *Davkes v. Lorane*, 3 Wils. 207. The case is often referred to as an exposition of the common law as respects such paper. Although such an instrument need not be expressed in any certain form or set of words, yet it must have some essential qualities, without which it is not a bill of exchange. It is

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said: "It must carry with it a personal and certain credit given to the drawer, not confined to credit upon any thing or fund;
 * * * he to whom such bill is made payable or indorsed takes it upon no particular event or contingency, except the failure of the general personal credit of the persons drawing or negotiating the same."

The courts of this country have, with great unanimity, given the same general definition of negotiable instruments. This court, in *Baird v. Underwood*, 74 Ill. 176, said: "It enters into the definition of a promissory note, that the money must be payable at all events, not depending on any contingency either in regard to the event or the fund out of which payment is to be made, or to the parties by or to whom payment is to be made." *Husband v. Epling*, 81 Ill. 172; *Mills v. Kuykendall*, 2 Black. 47; *Harriman v. Sandborn*, 43 Me. 128; *West v. Foreman*, 21 Ala. 400; *Corbett v. State*, 24 Ga. 287.

The statute of this State makes all promissory notes, bonds, bills and other instruments in writing, whether for the payment of money or articles of personal property, assignable by indorsement thereon under the hand of the payee, in the same manner that bills of exchange are; but it is essential to the negotiability of such instruments that they must be payable absolutely and unconditionally, not depending on any contingency, either in regard to the event or the fund out of which payment is to be made, or as to the parties by or to whom payment is to be made. Otherwise such instruments are not assignable, either at common law or under our statute, so as absolutely to transfer and vest the property in the assignee and enable him to maintain an action in his own name. An instrument for the payment of money, not assignable or negotiable, as those words are used in the law, is subject to the same defenses in the hands of the holder, notwithstanding he may have in good faith paid full value therefor, as could be made against the original payee.

Applying these well understood principles, it is apparent that receivers' certificates, such as the one found in this record, have not the essential qualities of negotiable or commercial paper. They are of recent introduction in business transactions, and have not been the subject of much judicial construction. The most that can be predicated of them is, that they are evidence in the hands of the holder that he is entitled to receive from the fund under the

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control of the court that authorized its officer to issue them, the amount specified, if the fund is sufficient to pay in full all holders of such certificates, or if it is not sufficient, then only a *pro rata* share with other holders. Nearly every quality essential to the negotiability of commercial paper is wanting in such certificates. In the first place, they are not payable unconditionally out of any fund. Whether in any event they are payable in full depends on the question whether the fund under the control of the court is sufficient for that purpose. That fact cannot be known except upon inquiry into the amount of such certificates issued by the officer authorized to act, and as to the value of the fund to be administered. A bill of exchange is not good when drawn payable out of a particular fund that is uncertain and contingent. The fund out of which payment is to be made must be certain as well as the obligation of the maker or drawer. *Dawks v. Earl of De Loraine*, 2 Blackst. 782. Then, again, there is no personal liability upon any one for the payment of such certificates, and, as we have seen, one essential quality of negotiable paper is the personal liability of the maker.

In *Mills v. Kuykendall*, *supra*, a draft by an heir upon the administrator to pay a certain sum out of his share of the estate was held not to be a bill of exchange, and the reason assigned was it was not drawn upon the general credit of the drawer, but was only a request to pay out of a particular fund. English cases cited are to the same effect. That is precisely the case here. Certificates of indebtedness, made by a receiver under the direction of the court, bind no one personally, nor can any action be maintained on such instruments against any one. Only the fund or property under the control of the court is bound, and that only when it is equitable to charge such fund with the payment of the money evidenced. Such instruments, not having the qualities of negotiable paper, are not assignable under our statute, or as at common law, so as to bar the equities existing against the payees to whom they were issued. The same conclusion was reached by the court in *Bank of Montreal v. C. C. and W. R. R. Co.*, 48 Iowa, 518, where an analogous question was considered.

The conclusion reached rests upon legal principles that have long been settled, but the rule deducible therefrom has the strongest equitable considerations for its support. It usually appears on the face of such instruments by what authority they were issued, and

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for what specific purpose. Holders therefore will always be chargeable with notice of these facts. Considerations of the highest concern to all parties interested in the trust property make it imperative the court that charges the fund, through its appointed officer, should have the most vigilant care that the property is not improvidently wasted. All persons dealing in such securities must know that payment can only be coerced by application to the court having the control of the trust property for an order upon its acting officer. Such certificates have not been current in commercial transactions as bills of exchange and other negotiable paper, nor are they likely to become so. It is known they are issued only for the benefit of the trust property, and usually the specific purpose is mentioned on the face, or as in this case, on the back of the certificate. The design is only to charge the trust property, and that only so far as it is equitable to do so. While courts will be zealous to protect the rights of parties who may have furnished money for the preservation of the trust property, equal care will be observed to see that the property is not wasted by improvident acts of receivers.

In this case the certificate was issued to a party to whom the trust property equitably owed nothing. It was transferred to the intervening petitioners as collateral security for his individual indebtedness to them. Equitably the payee had no claim whatever on the trust property, and as the holders occupy his shoes they stand in no better position in a court of equity where the fund is being administered.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

HOLLENBECK V. WINNEBAGO COUNTY.

(95 ILL. 148.)

Municipal corporation — negligence — injury in erection of court-house.

An action will not lie against a county for a personal injury sustained through the negligence of its employees in the erection of a court-house. (*See note, p. 159.*)

ACTION of negligence. The opinion states the case. The defendants had judgment below.

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N. C. Warner, for appellant, cited *Conrad v. Trustees of Ithaca*, 16 N. Y. 171; *Mayor of New York City v. Furze*, 3 Hill, 618; *Rochester White Lead Co. v. City of Rochester*, 3 Comst. 467; *Barton v. City of Syracuse*, 36 N. Y. 54; *Emery v. Lowell*, 104 Mass. 13; *Child v. Boston*, 4 Allen, 41; *McGregor v. Boyle*, 34 Iowa, 268; *Requa v. City of Rochester*, 45 N. Y. 129; s. c., 6 Am. Rep. 52; *Haines v. Lockport*, 50 N. Y. 236; *McCarty v. City of Syracuse*, 46 id. 194; *Lloyd v. Mayor of New York*, 1 Seld. 369; *Baker v. Boston*, 12 Pick. 184; *Thayer v. Boston*, 19 id. 511; *People v. Corporation of Albany*, 11 Wend. 544.

J. C. Garver and *William Lathrop*, for appellee.

ORRIG, J. This was an action on the case, brought by Hannah Hollenbeck, administratrix of the estate of Almarin Hollenbeck, deceased, against the county of Winnebago, Duncan Ferguson, F. E. Latham, Anthony Haines, Hugh Mackey, Jo B. Merritt, John R. Herring and Jonathan H. Kirk, to recover for the death of Almarin Hollenbeck, who was killed by the falling of a portion of the court-house while it was being erected, the deceased, at the time being engaged as a workman on the building. The declaration contained five counts. The first count was as follows:

For that whereas the defendants, before and on the 11th day of May, A. D. 1877, were possessed and had the supervision and control of a certain building, situate on a certain piece or parcel of land in the county of Winnebago aforesaid, before that time dedicated to the use and purpose of a court-house square or site, and which building was then and there being erected by and under the supervision and control of the defendants as and for a court-house, for the county aforesaid, and in pursuance of a resolution of the board of supervisors of Winnebago county aforesaid, before that time duly passed therefor, and ought to have kept the same in good and safe condition while the same was being so erected as aforesaid; yet the defendants, not regarding their duty in that behalf while they were so possessed and had the supervision and control of the erection of the court-house building aforesaid, to wit: on the 11th day of May, A. D. 1877, there wrongfully and negligently suffered the same to be and remain in a bad and unsafe condition, and to be erected in a negligent and unsafe manner, and the main pavilion to said court-house building to rest, on three sides thereof upon iron girders without sufficient lateral stiffness, and the ends

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of said girders resting upon the front wall to said main pavilion without sufficient bearing upon said front wall; and certain iron pillars, supporting certain parts of said building, to stand upon certain brick piers insufficient in size and strength to support the weight placed upon said iron pillars, by means whereof a large portion of said building fell, and the plaintiff's intestate, who was then and there lawfully engaged, as a brick mason, in labor upon the main pavilion, and upper portion of said court-house building, in the erection thereof, and while the said plaintiff's intestate, to wit: Almarin Hollenbeck, with all due care and diligence, was so engaged in the performance of said labor, on said building as aforesaid, was cast down with great force and violence, and buried in the ruins of such portion of said building as so fell, as aforesaid, and was thereby then and there killed. And the plaintiff avers that the said Almarin Hollenbeck left him surviving the plaintiff, his widow, and one Frank Hollenbeck, his minor son and next of kin, who are still living; and that by reason of the death of said Almarin Hollenbeck, as aforesaid, the said plaintiff has been and is deprived of her means of support; and the said Frank Hollenbeck has been and is deprived of his means of support and education.

The fifth count charges, the defendant county lawfully engaged in the erection of a court-house for Winnebago county, and the other defendants lawfully engaged as a building committee in supervising and controlling the erection of the building under an appointment by the board of supervisors, and that defendant Latham was engaged as superintendent under a like appointment of the board; that defendants had supervision and control of the building so far as to select suitable plans, employ suitable material and create suitable structures therefor, suitable both in size and material to make the building safe and fit for use by persons having business on the same during its erection. Then follows the averment that the defendants carelessly and negligently suffered the building to be erected on a weak and insufficient structure; that it fell of its own weight; also suffered unsafe and insufficient plans to be used in the erection of the building, and employed an incompetent superintendent, etc., by means whereof, etc.

The second count is similar to the first, except it is therein averred that the building was being erected in pursuance of the terms of a written contract duly made, by reason whereof it was the duty of the defendants to adopt a good and sufficient plan and

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to make a contract for the erection of a safe building. Then follows the breach negating these duties and averring wherein the building was unsafe, etc.

In the third count it is averred that the county of Winnebago, together with the other defendants, who were a building committee chosen by the board of supervisors, entered into a contract in writing with one Richardson for the erection of the court-house, and by the terms of the contract defendants, the county by its board, committee, agent or superintendent, had the right at all times to visit and inspect the building and require any change in the construction of the building; that defendant Latham was by a vote of the board chosen superintendent, and acted as such; that defendants had the control of the contractor and power to control the use of materials, by means whereof defendants ought to have kept the building reasonably safe for persons lawfully on the same. Then follows the breach specifically negating the allegations of duty.

The fourth count is in substance like the second.

A demurrer both general and special was interposed by the defendants to each count of the declaration, which the court sustained, and the plaintiff elected to abide by the declaration. Judgment was rendered against her for costs, to reverse which she appealed.

The only question to be determined is, whether a legal cause of action is set out in either count of the declaration. It is contended that the seven individual defendants may be held liable even if an action cannot be sustained against the county. We will therefore consider first the liability of the individual defendants; second, that of the county.

[Omitting the first.]

This brings us to the consideration of the liability of the county, which is the most important question in the case. If the action can be maintained, does it lie at common law, or by statute? As respects the common-law liability of a county for the negligence of its officers or agents, the question has frequently arisen in different forms in the courts of England and this country, and as we understand the authorities, we regard the question well settled that there is no common-law liability.

Dillon, in his work on Municipal Corporations, § 762, after a discussion of the question and a reference to authorities, concludes

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as follows: "Accordingly, in the different States, organizations, such as counties, townships, school districts, road districts and the like, though possessing corporate capacity and power to levy taxes and raise money, have been very generally considered not to be liable in case or other form of civil action, for neglect of public duty, unless such liability be expressly declared by statute." See, also, Addison on Torts (vol. 2, p. 1298), where the same doctrine is announced.

At an early day in Massachusetts, in *Riddle v. Proprietors*, 7 Mass. 169, PARSONS, C. J., in delivering the opinion of the court, said: "We distinguish between proper aggregate corporations and the inhabitants of any district who are by statute invested with particular powers without their consent. These are in the books sometimes called *quasi* corporations. Of this description are counties and hundreds in England; and counties, towns, etc., in this State. Although *quasi* corporations are liable to information or indictment for a neglect of public duty imposed upon them by law, yet it is settled in *Russell v. Inhabitants of the County of Devon*, that no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute."

In the late case of *Hill v. Boston*, 122 Mass. 344; s. c., 23 Am. Rep. 332, the court, in an elaborate opinion and an exhaustive review of the authorities, both English and American, adhere to the same doctrine. Referring to the case cited *supra*, in connection with the case of *Mower v. Leicester*, 9 Mass. 247, it is said: "These cases have ever since been considered as having established, in this Commonwealth, the general doctrine that a private action cannot be maintained against a town or other *quasi* corporation for a neglect of a corporate duty, unless such action is given by statute."

In *Bartlett v. Crozier*, 17 Johns. 250, which was an action against an overseer of highways, at the suit of an individual, for an injury which he had sustained in consequence of the neglect of the overseer to keep a bridge in repair, it was held, Chancellor KENT delivering the opinion of the court, and citing *Russell v. Men of Devon* as an authority, that the action would not lie.

In New Jersey it has been held that counties and towns are not liable to private action for injuries occasioned by defective highways and bridges, although towns and counties under the statute of this State are made corporations with power of suing and being sued. *Cooly v. Freeholders of Essex*, 3 Dutch. 415; *Livermore v.*

Freeholders of Camden, 5 id. 245. The same rule of law is declared in Michigan. *Comr. of Highways v. Martin*, 4 Mich. 557.

The question whether an action could be maintained against a county for a failure to keep in repair a bridge on a highway, a duty enjoined on the county by statute, first arose in this State, in *Hedges v. County of Madison*, 1 Gilm. 567, and it was held, citing with approval the English case of *Russell v. Men of Devon*, that although counties were by statute authorized to sue and be sued, the action would not lie against a county unless expressly given by statute.

In *Schuyler County v. County of Mercer*, 4 Gilm. 20, the question arose whether a county, in the absence of a statute conferring the right, could be sued, and it was expressly held that independent of a special statute counties have no common-law right to sue, nor can they be sued.

In *Town of Waltham v. Kemper*, 55 Ill. 346; s. c., 8 Am. Rep. 652, an action was brought by the plaintiff against the town to recover damages for personal injuries received on a public highway which the town had suffered to be and remain out of repair, and which, under the statute, it was the duty of the town to keep in good condition. It was there held that while such corporations as villages, incorporated towns and cities are liable to private actions for injuries which an individual may sustain by reason of the neglect of the corporate authorities to keep their streets and sidewalks in repair, there is a distinction between that character of corporations and towns established by law as civil divisions of a county,—the latter not being liable, either by the common law or any statute of the State, to private actions for injuries occasioned by the neglect of the town officers to keep the highways in repair. In this case *Town of South Ottawa v. Foster*, 20 Ill. 296, was overruled, and the earlier cases on the question approved. The same doctrine was announced in *Bussell v. Town of Steuben*, 57 Ill. 35.

In *White v. County of Bond*, 58 Ill. 298; s. c., 11 Am. Rep. 65; where an action on the case was brought by the administrator of White, deceased, against the county, for wrongful neglect in keeping a bridge over a certain creek in good repair, by means whereof the deceased lost his life, after referring to and approving the former decisions of the court on the same subject, it was held that no action could be maintained against the county.

Again, in *Symonds v. Clay County*, 71 Ill. 355, an action on the case was brought to recover for damage done plaintiff's land by

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means of fire which had spread from the poor farm, belonging to the county, through the negligence of the servants of the county in charge of the farm, and it was held that the county was not liable at common law or by statute. It is there said: "Unless made so by express legislative enactment counties are not considered liable to persons injured by the wrongful neglect of duty, or wrongful acts of their officers or agents, done in the course of the performance of corporate powers, or in the execution of corporate duties."

Indeed, the decisions in this court, beginning with the *Hodges* case, in 1 Gilman, and ending with the case last cited, are uniform to the effect that no corporate liability exists against *quasi* corporations, such as counties and towns.

No reason is perceived why a county should be held to respond in damages for the negligence of its officers while acting in the discharge of public corporate duties enjoined upon them by the laws of the State. Counties are but local subdivisions of the States established by the sovereign power of the State, clothed with but few corporate powers, and these not of a private, but rather of a governmental character, relating to the support of the poor, the making of public highways and the general administration of justice within their respective boundaries. In fact, the powers and duties of counties bear such a due analogy to the governmental functions of the State at large that as well might the State be held responsible for the negligent acts of its officers as counties. They stand in many respects upon the same footing. The one as well as the other is organized for political purposes. But it is said this case differs from the authorities cited in this, that the alleged negligence was affirmative in character, imputed to the county itself. The authorities, however, do not seem to make a distinction between the negligence of a town or county in failing to observe a duty and the performance of that duty in a negligent manner. In *Hamilton Commissioners v. Mighels*, 7 Ohio St. 109, where a witness attending court fell into the cellar of the building and was injured, on account of the defective manner in which the court-house was constructed, it was held in an able and elaborate opinion that the county was not liable.

In *Eastman v. Meredith*, 36 N. H. 284, where a legal voter of the town attended a town-meeting at the town-house, the floor of which gave way and fell in consequence of the negligent and

improper manner in which it was constructed, it was held that an action would not lie against the town for an injury received, although it was the duty of the town to provide a safe and suitable place for holding town-meetings.

In *Freeholders of Sussex v. Strader*, 3 Harr. 108, it is said: "It is the duty, for instance, of the board of freeholders to erect and keep in repair court-houses and jails; a neglect to do so may occasion great inconvenience, perhaps positive loss and injury to some individual whose business or duty requires his attendance at court. The building, by being old and out of repair, may give way and break a man's limbs or occasion him injury in some other way, but no one will pretend that in such case an action would lie by the person injured against the county." See, also, *Bigelow v. Randolph*, 14 Gray, 542, and *Hill v. Boston*, 122 Mass. 344; s. c., 23 Am. Rep. 332.

After a careful examination of the authorities we perceive no ground upon which it can be held that the county at common law is liable. Nor do we find any statute that imposes a liability upon the county in a case of this character. The county is but a *quasi* corporation with limited powers. Under the statute it may sue and be sued, it has power to purchase and hold real and personal estate necessary for the use of the county, to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers. The county board has power to manage the county funds and county business, to examine and settle all accounts against the county, to cause to be annually levied and collected taxes for county purposes. It is also the duty of the county board to erect or otherwise provide, when necessary and the finances will justify it, and keep in repair, a suitable court-house, jail and other necessary county buildings. These and a few other similar provisions constitute the duties and powers enjoined upon and delegated to the county, and the county boards of the several counties, by the legislature, but there is no provision of the statute which confers a right of action in favor of an individual against a county for a negligent act of the county or its board in the transaction of the affairs of the county. Suppose a judgment should be obtained against the county in a case of this character, there is no statute which authorizes the levy and collection of a tax for the purpose of paying such a judgment. No funds have been provided to meet a case of this description, and no

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means devised by which money could be raised, doubtless for the very reason that it was not supposed that a liability existed.

The conclusion which we have reached, then, is that no action can be maintained, either at common law or by statute, as against the county.

The demurrer was, in our judgment, properly sustained, and the judgment must be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—To same effect, *Wood v. Tipton County* (7 Baxt. 113), 23 Am. Rep. 551. Two recent Massachusetts cases are noteworthy on the subject of the liability of towns for injuries caused by defects in public places. In *Clark v. Waltham*, 128 Mass. 557, it appeared that as the plaintiff was passing along one of the foot-paths or concrete walks of a public park, after dark, and just before leaving the same and entering upon one of the public streets, and being barefoot at the time, he stepped upon the rough iron stub of a post, which lacerated his foot and caused the injuries complained of; that this iron stub was the remnant of an iron post or rod fastened into a stone sleeper, which originally, with other posts, protected an opening in a continuous fence around the park from all but foot passengers, and was at the entrance of the park, and slightly outside the limits of the street; that this post had been broken off a long time before the accident; that this park was conveyed to the town upon the condition that it should "forever after be kept open as and for a common for the use of said inhabitants of the town of Waltham." The court said: "By accepting the deed of conveyance, the town agreed to the condition contained therein, and therefore holds the park for the use of the public. It had constructed foot-paths and walks over the park in various directions, but those paths were not a part of the system of highways. They were not laid out as public ways, and the town is not liable under the statutes respecting highways or town ways for any defect or want of repair which may exist in them. *Oliver v. Worcester*, 103 Mass. 439: s. c., 3 Am. Rep. 435; *Gould v. Boston*, 120 Mass. 300. Nor can the town be held liable upon the ground that it negligently suffered a dangerous place to exist in the park, and failed to give proper notice to persons using the park by its invitation or license. It holds the park, not for its own profit and emolument, but for the direct and immediate use of the public. If it can be said that there is any duty in the town to construct paths over it or to keep such paths in repair, it is a corporate duty imposed upon it as the representative and agent of the public and for the public benefit. For a breach of such a duty, a private action cannot be maintained against a town or city, unless such action is given by statute. *Hill v. Boston*, 122 Mass. 344; s. c., 23 Am. Rep. 332, and cases cited. The defendant had judgment.

The other case, *Larrabee v. Peabody*, 128 Mass. 551, was an action to recover for personal injuries sustained by falling into a trench near a public building. The building in question, which was erected and owned by the defendant town, was used for a town house and school-house, and it also contained an audience hall, which had been used for various kinds of public meetings and entertainments, the occupants paying a small sum for the use of it. On the evening of July 10, 1877, an entertainment was given by a temperance society in the hall, which the plaintiff attended; and no charge was made to the society for the use of the hall on this occasion or during that summer. A trench had been dug in front of the building for the laying of a water pipe to connect the aqueduct in the street with the pipes in the building. There was no barrier placed to guard the trench. The plaintiff in passing out of the building stepped backward and fell into the trench, receiving the injuries complained of. The place where she stepped into the trench was from two to four feet from the outer direct line of travel from the street to the steps, and there was a grass plot covering that portion of the yard. The court said: *MORRIS, J.* "It is not claimed that the town is liable as for a defect in a highway. The trench was not in the highway, nor in dangerous proximity to it. But the plaintiff claims that the trench was in dangerous proximity to the way or path leading to the town house, and that the

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town is liable to the same extent as a private owner who invites persons to enter his hall would be. If we assume, in favor of the plaintiff, that upon the evidence, a private owner would be liable to her for her injury, yet we are of opinion that the town is not liable. The only ground upon which it is claimed that a city or town is liable for defects in, or negligence in the repair or management of, buildings owned by it, is that at the time the liability attaches, it is using the buildings for emolument or profit as a private owner might. *Oliver v. Worcester*, 103 Mass. 489; a. c., 3 Am. Rep. 483; *Hill v. Boston*, 122 Mass. 344; a. c., 23 Am. Rep. 332. In the present case this element of liability is wanting. The town received no compensation or profit from the use of the hall on this occasion. The case therefore is not within the reason of the rule relied upon, which creates a liability of the town. The fact that the town had before this occasionally let the town house for public meetings and entertainments is immaterial. Such occasional lettings would not create a permanent and continuing liability. The liability, if any, attaches because the town deals with and uses the public building for the purposes of profit, as a private enterprise, and it continues only so long as it thus uses it." These decisions are in harmony with the current of authority which denies the common-law liability of a municipal corporation for such accidents in cases falling short of nuisance. The *Hill* case was that of a child injured by an unsafe stairway in a public school-house.

In *Alamango v. Board of Supervisors*, decided recently by Justice LEARNED of the New York Supreme Court, at Special Term, the complaint charged that the plaintiff was a convict in the Albany penitentiary; that he had been directed to take sawdust away from a circular saw, and refusing because he deemed it dangerous, had been punished and compelled to do it, and in so doing, owing to the negligence of the persons in charge, had suffered the loss of a hand. The defendant demurred, and the demurrer was sustained. The court held, first, that the county is not in the full sense of the word a municipal corporation; second, that the penitentiary is, like the county jails, a part of the State means for punishing criminals, the persons confined there being prisoners of the State, and the officers not being agents or servants of the county, although the county has their appointment; and third, that the State or county cannot be said to be carrying on the penitentiary for profit. The court said on the latter point: "Nor does it alter the condition of affairs that these prisoners of the State or of the United States are required to work, and are thus compelled partially to recompense the wrong which they have done and the expense which they have caused to civil society." This case is clearly distinguishable from *Moulton v. Town of Scarborough*, 71 Me., and the cases there cited. That was where the town was held liable for an injury to an individual by a ram kept by the town on the poor-farm for propagating sheep.

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(95 Ill. 190.)

Damages—liquidated or penalty.

A contract for the sale of land provided for the payment of over \$22,000 purchase-money, by a certain day, as a precedent and essential condition, and that in case of any default in payment of the price, the vendor might declare the contract null and void, and retain any sums of money paid, and might sue and recover from the purchaser the whole or any part of the price that might be due and unpaid, as liquidated damages. Nothing was paid, and the vendor did not part with possession. In an action on the agreement to recover the entire price as liquidated damages, *held*, that a demurrer was properly sustained to the declaration.*

* See note, 30 Am. Rep. 22.

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ACTION of covenant, on an agreement for the sale of land, to recover the purchase-money. The defendant covenanted, in consideration of the sale, to pay plaintiff \$22,770 within one year from the 26th day of June, 1869, and to pay the taxes on the land for that year; that payment should be a condition precedent, that time of payment was of the essence of the contract, and if they should make default in payment of the money, or any part of it, when due under the contract, plaintiff, at his option, at any time after default, might declare the contract null and void, and might retain any sums of money which might be paid, and "may sue and recover from said parties of the second part the whole or any part of said sum of money that may be due and unpaid, as liquidated damages." Plaintiff was to retain possession and have the rents and profits until the purchase-money should be paid. A deed was tendered and demand of payment was made but nothing was paid. The defendant demurred, and had judgment.

C. M. Harris, for appellant, cited *Smith v. Whittaker*, 23 Ill. 367; *Stephens v. Coffeen*, 39 id. 148; *Bouv. Law Dict.* vol. 2, p. 86; *Knapp v. Mattly*, 13 Weed, 587; *Bagby v. Paddie*, 16 N. Y. 469; *Catheal v. Talmage*, 9 id. 551; *Leland v. Stone*, 10 Mass. 462; *Chadwick v. Marsh*, 1 Zab. 463; *Sedg. on Damages*, 405, note, 408, etc., 421 and note, 411; *Reilly v. Jones*, 1 Bing. 302; *Slosson v. Beadle*, 7 Johns. 72; *Hasbrouck v. Tappan*, 15 id. 200.

PER CURIAM. The question presented by this demurrer is whether the \$22,770 named in the agreement as the price of the land, and also as liquidated damages in case that sum was not promptly paid, may be recovered, or only such damages as can be shown to have been actually sustained by breach of the agreement.

Appellant has the land, and by this action seeks to recover its full price and also retain the land. It is manifest that his actual loss cannot be equal to the value of the land. If it was worth nothing, then appellees agreed to pay this large sum for what was of no value. If it was worth that sum, then appellant has land of that value, unless its market price has depreciated. And if depreciated, then his loss is only commensurate with the depreciation. It is therefore clear that his loss is not equal to the sum named as liquidated damages.

The fact that the parties fix a sum to be paid and call it liqui-

dated damages does not always control the question as to the measure of the recovery for the breach of the contract. Courts will look to see the nature and purpose of fixing the amount of damages to be paid. And if the clause fixing the amount of the damages appears to have been inserted to secure prompt performance of the agreement, it will be treated as a penalty, and no more than the actual damages proved can be recovered.

It is said in Sedg. on Meas. Dam. 492: "But in the case we are now considering, the courts, especially in this country, have generally shown a marked desire to lean toward that construction which excludes the idea of liquidated damages, and permits the party to recover only damages which he has actually sustained. The language of the contract is not controlling. If indeed the word 'penalty' be used, as we shall see hereafter, it will never be construed as a sum absolutely fixed. But the reverse is by no means the case; and the phrase '*liquidated damages*' has often been made to read '*penalty*.'"

That author further says, p. 493: "If, from the nature of the agreement, it is clear that any attempt to get at the actual damage would be difficult, if not vain, then the courts will incline to give the relief which the parties have agreed on. But if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the term liquidated damages will not prevent the courts from inquiring into the actual injury sustained and doing justice between the parties." The weight of the authorities sustains these propositions.

The language in this character of contracts is no more explicit or emphatic for paying the sum named than is the penalty of a bond. And all know such penalties are never enforced, but simply the actual damage sustained, if less than the amount of the penalty. The same reasons may and frequently do exist for holding, under such an agreement as this, that no more than the actual damage shall be recovered, as in cases of penal bonds.

When to enforce such an agreement would work great hardship and oppression, it should never be enforced. In this case no inconvenience is perceived in proving the actual damages appellant has sustained. And it would be highly unjust and oppressive to permit a recovery of such a large sum when the actual damages do not exceed, if they reach, one-twentieth part of the amount claimed. Why allow perhaps more than twenty thousand dollars, or even

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more, than the loss sustained? If it be said it is the contract of the parties, it may be replied it is no more so than is a penal bond.

All the circumstances considered, it would seem incredible to believe that sane parties could have understood and intended to pay as damages \$22,770, simply for a failure to pay that sum of money on a specified day, and permit the owner to hold the land free from all claim on their part, simply to give the greater part, and it may be all, to him without any consideration or benefit in the smallest degree commensurate to this large sum. To so believe would be absurd, and it would be highly oppressive to so hold.

To give the language in this case the construction that it is absolute and must be carried out literally, would work the same wrong and oppression that was originally produced by enforcing payment of penal bonds. And for the same reasons this should not be enforced. But appellant should be left to recover such damages only as he can prove he has sustained by reason of the breach of the contract.

It is true, the parties are authorized to agree upon any sum as compensation for the breach of the contract, which does not manifestly exceed the amount of the injury suffered. This is believed to be the doctrine of the courts and to be well sustained by authority.

In this case it is manifest that the sum fixed is above, and greatly above, all damage that could have been sustained by the breach of this contract. And we must hold that it was inserted as a penalty to secure prompt payment, and intended to be paid absolutely in case of failure to pay for the land on the day specified and on the contract being rescinded.

The judgment of the court below must be affirmed.

Judgment affirmed.

McCORMICK v. BURT.

(93 Ill. 268.)

Schools — school director — expulsion of scholar — liability for.

School directors, empowered by statute with discretionary power to suspend or expel scholars from the public schools are not personally liable for the exercise of that power unless they act wantonly or maliciously.*

* So held in respect to assessors. *Williams v. Weaver*, 75 N. Y. 80.

ACTION of damages for suspension from a public school. The opinion states the case. The defendants had judgment below.

C. C. Strawn and A. E. Ambary, for appellant.

L. E. Payson and S. S. Lawrence, for appellees.

SCOTT, J. This was an action on the case, brought by Edward McCormick against Cora Burt and the directors of the school she was teaching, to recover damages on account of his suspension by the directors from the benefits of the school for the non-observance of a rule adopted by them for the government of the school. The substance of the rule adopted is, the teacher might read as an opening exercise every morning, not occupying more than fifteen minutes, a chapter from the King James' translation of the Bible. No one was required to be present at or participate in such exercise unless he chose to do so, and while such exercise was being conducted every pupil was required to lay aside his books and remain quiet. Plaintiff was a Catholic, and for the non-observance of the rule, which it is alleged was void, as interfering with the religious convictions of the plaintiff and his father, by pursuing his usual studies without noise or disturbance, he was suspended from "all the rights and privileges of said school until he should express a willingness to comply with the rule." A general demurrer was sustained to the declaration, and plaintiff having elected to stand by his declaration, judgment was rendered against him for costs.

By section 48 of the school law the directors of each school district are made a body politic and corporate, and among other things, it is made their duty to "adopt and enforce all necessary rules and regulations for the management and government of schools, * * * to direct what branches of study shall be taught and what text-books and apparatus shall be used in the several schools," and "they may suspend or expel pupils for incorrigibly bad conduct, and no action shall lie against them for such expulsion or suspension."

In the performance of the duties imposed by law upon school directors they must exercise judgment and discretion. What rules and regulations will best promote the interests of the school under their immediate control, and what branches shall be taught and what text-books shall be used, are matters left to the determination of the directors, and must be settled by them from the best lights

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they can obtain from any source, keeping always in view the highest good of the whole school. Good order can only be obtained by enforcing discipline, and that power is largely committed to the directors. They have the power of suspension or expulsion, and they may exercise that power as a means of discipline for the causes mentioned in the statute. The expulsion or suspension of a pupil from the benefits and privileges of the school for what is considered "incorrigibly bad conduct," implies deliberation and decision on the part of the directors, or as it is sometimes expressed, they act judicially, in a matter involving discretion in relation to the duties of their office.

The declaration in this case contains no averment that defendants, in suspending plaintiff from the benefits and privileges of the school, acted either wantonly or maliciously. That, we think, is a fatal defect in the declaration, and justified the decision of the court sustaining the demurrer. The absence of such an averment leaves the court free to indulge the presumption defendants acted in good faith in the matter of suspending plaintiff from the benefits of the school, whether they erred in their judgment or not. In such cases the law seems to be well settled there can be no action maintained against school officers where they act without malice.

The rule is certainly a reasonable one. A mere mistake in judgment, either as to their duties under the law or as to facts submitted to them, ought not to subject such officers to an action. They may judge wrongly, and so may a court or other tribunal, but the party complaining can have no action when such officers act in good faith and in the line of what they think is honestly their duty. Any other rule might work great hardship to honest men, who, with the best of motives, have faithfully endeavored to perform the duties of these inferior offices. Although of the utmost importance to the public, no considerable emoluments are attached to these minor offices, and the duties are usually performed by persons sincerely desiring to do good for their neighbors, without any expectation of personal gains, and it would be a very harsh rule that would subject such officers to an action for damages for every mistake they may make in the honest and faithful discharge of their official duties as they understand them. It is not enough to aver the action of such officers was erroneous, but it must be averred and proved that such action was taken in bad faith, either wantonly or maliciously. If in the discharge of their official duties, such off-

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cers simply err, it is what other tribunals invested with discretionary powers are liable to do.

A case not unlike the one before us was before the court in *Donahue v. Richards*, 38 Me. 389, and it was ruled, in accordance with what was thought to be a uniform course of decisions, that a public officer, when acting in good faith, is never held liable for an erroneous judgment in a matter submitted to his determination. Were the rule otherwise no one would be safe in taking upon himself the burdens of an office the duties of which involved the exercise of judgment.

In *Jackson v. Waldron*, 11 Johns. 114, it was held that officers called to exercise their deliberative judgments are not answerable for mistakes in law, either civilly or criminally, where their motives are pure and untainted with fraud or malice. The English cases on this subject hold the same doctrine. *Hannan v. Toppenden*, 1 East, 555, declares no action will lie against individuals for acts erroneously done by them in their corporate capacity from which detriment may happen to another, without proof of malice.

In *Bernier v. Russell*, 89 Ill. 60, the judges of the election were held liable to an action for refusing to allow a villager to vote, but the declaration in that case contained a distinct averment such refusal was "malicious and wanton."

This objection to the declaration being conclusive of the whole case, we have not deemed it necessary to remark upon other questions raised on the argument.

The judgment must be affirmed.

Judgment affirmed.

UNION MUTUAL INSURANCE COMPANY V. CAMPBELL.

(35 Ill. 267.)

Deed—delivery—presumption from recording.

The mere act of recording a deed, when done by the grantor, is but *prima facie* evidence of delivery to the grantee, liable to be rebutted, and it is successfully rebutted when it is shown that the deed was not in the nature of a family settlement, or of gift to a minor, but was a deed of trust, intended to confer no benefit on the grantee, and its execution and record are wholly unknown to him until after the death of the grantor.*

* See *Bell v. Farmers' Bank* (11 Bush, 24), 21 Am. Rep. 205.

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ACTION to remove cloud from title. The alleged cloud was a deed from Alexander Campbell to Alexander McEwen. The facts sufficiently appear in the opinion. The complainant had judgment below.

Kendall & Bliss, for appellants.

H. T. Helm, for appellee.

SCHOLFIELD, J. The principal question to be determined on this record is, was the deed from Alexander Campbell to Alexander McEwen delivered by the former to the latter, and accepted by the latter in the life-time of the former?

The propositions contended for by appellants' counsel: 1st. That where a deed, duly executed, is found in the hands of the grantee there is a strong implication that it was delivered. 2d. That the *onus probandi* is upon the party denying the delivery. 3d. Where a deed is of a beneficial character an acceptance by the grantee may be presumed — especially where the grantee is a minor and the deed is for the purpose of effecting a voluntary settlement. And 4th. That the execution and recording of a deed by the grantor is *prima facie* evidence of a delivery — may all be conceded to be well-established law without seriously affecting appellee's claim, for the deed from Campbell to McEwen was not found in the possession of McEwen, and we are not left to implication or inference to ascertain what were the facts, so far as relates to the delivery to McEwen and his acceptance of the deed.

Mrs. Campbell testifies that after the death of Campbell she made search for this deed but was unable to find it; that she then went to McEwen and asked him in regard to it. He denied that he knew any thing of the deed or that he had ever heard of it. She then went (on the suggestion of some one that she make search there) to the recorder's office, and there, on inquiry, found the deed. She says that after the deed was signed and acknowledged by herself and husband she had no further knowledge of it until as above stated. Her husband never mentioned to her what he did with it.

McEwen testifies that about two years before the death of Campbell the latter asked him if he (McEwen) had any objection to his (Campbell's) conveying these lots over to him, and that he replied

in the negative, but that Campbell never mentioned the subject to him again, and that he never knew that he had made a deed conveying the property to him until after Campbell's death and when asked about the deed by Mrs. Campbell; that he never paid any thing for the lots, and after Mrs. Campbell found the deed at the recorder's office and notified him that it was there he went and got it, and subsequently, upon her request, conveyed the property to her. He says he had no information whatever of the execution or existence of this deed in the life-time of Campbell.

These witnesses are corroborated by the evidence of the notary before whom McEwen's deed to Mrs. Campbell was acknowledged, showing that they then both gave the same version of the matters they now do.

There is no evidence of any direction by Campbell to the recorder in regard to the deed, nor indeed of how that instrument got to the recorder's office.

Campbell is shown to have been at the time the deed was executed, despondent, low-spirited and reticent, and this gradually increased upon him until shortly before his death, when he was declared insane in consequence of softening of the brain.

The *prima facie* evidence of a delivery of the deed from the fact of recording was liable to be rebutted. *Jackson v. Perkins*, 2 Wend. 308; *Gilbert v. North American Fire Insurance Company*, 23 id. 43, — and the facts here conclusively rebut that presumption. The deed was not in fact delivered, and its existence was not known of by the grantee in the life-time of the grantor.

In *Jackson v. Phipps*, 12 Johns. 418, Joseph Phipps being in embarrassed circumstances, in the fall of 1808 went to his brother, Aaron Phipps, and agreed to give him a deed of his farm to secure two notes of about \$130, with interest. Joseph Phipps accordingly returned home and executed and acknowledged the deed, and carried it to the clerk's office for recording on the day of its date, without the grantee or any person on his behalf being present, or receiving a delivery of the same. Aaron, the grantee, died in the fall of 1809, and in February, 1810, the defendant received the deed as the son, and probably heir of Aaron.

The court, per SPENCER, J., said: "Under these circumstances the deed must be considered inoperative. It is requisite in every well-made deed that there be a delivery of it. The delivery must be actual by doing something and saying nothing, or else verbal by

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saying something and doing nothing; or, it may be by both, but by one or both of these it must be made. * * * A delivery of a deed, which, we have seen, is essential to its existence and operation, *ex vi termini*, imports that there be a recipient. It would be absurd to hold that a thing was delivered when there was no person to receive; and in this case, the grantee died without any delivery to him." In the present case we have only to substitute grantor for grantee, and obviously, the reasoning is equally applicable and cogent in the one case as in the other. To the same effect is *Jackson v. Richards*, 6 Cow. 617. See, also, *Fisher v. Hall*, 41 N. Y. 416.

So, it is held in Massachusetts that the mere recording of a deed is not conclusive evidence of a delivery. *Maynard v. Maynard*, 10 Mass. 456; 6 Am. Dec. 146; *Samson v. Thornton*, 3 Metc. 275; *Hawkes v. Pike*, 105 id. 560; s. c., 7 Am. Rep. 554; *Welch v. Sackett*, 12 Wis. 253.

The doctrine of *Jackson v. Phipps*, *supra*, is approved and followed, in a somewhat analogous case, by the Supreme Court of New Hampshire. *Derry Bank v. Webster*, 44 N. H. 267.

In *Younge v. Guilbeau*, 3 Wall. 641, the same doctrine is announced by the Supreme Court of the United States. In that case, however, the deed was found after the death of the grantor among his papers. The court said: "The delivery of a deed is essential to the transfer of the title. It is the final act, without which all other formalities are ineffectual. To constitute such delivery the grantor must part with the possession of the deed, or the right to retain it. Its registry by him is entitled to great consideration upon this point, and might perhaps justify, in the absence of evidence, a presumption of delivery. But here any such presumption is repelled by the attendant and subsequent circumstances. Here the registry was, of course, made without the consent of the grantee, as he had no knowledge of the existence of the deed, and the property it purported to convey always remained in the possession and under the control of the grantor."

In *Herbert v. Herbert*, Breese, 354, the same question was before this court. There the deed was acknowledged and recorded, but found by the administrator after the death of the grantor among his papers, there being no proof of an actual delivery. The court said: "It is most manifest that there could have been no delivery of the deed to the grantee, so as to pass the estate. The act of

recording a deed cannot amount to a delivery, when there does not appear an assent or knowledge by the grantee of the act. In this case there is not a scintilla of evidence calculated to lead the mind to the belief that the grantee ever knew of the existence of the deed until after the death of the grantor. There could then have been no acceptance by the grantee, because the possession of the deed, if such had been the fact, derived after the death of the grantor could not amount to one, there having been no delivery during the life of the grantor."

The court then quotes, with approbation, from *Jackson ex dem. Eames v. Phipps, supra*, after which it is further said: "Indeed, a delivery of a deed, which is essential to its existence and operation, necessarily imports that there should be a recipient. Now, in this case, it would be idle to contend that there was a delivery and reception, when the grantor died before the grantee knew of the existence of the deed. He could not then receive that of the existence of which he had no knowledge, nor could there have been a delivery to him without such an acceptance. There had been no act of the grantor, before his death, tantamount to a delivery, much less an actual one. The act of recording does not amount to it, because there appears a total absence of knowledge, on the part of the grantee, of such recording, or even of the existence of the deed, until after the death of the grantor, and it does not appear that he had ever received the deed." It would be impossible to use language more applicable to the facts here than this.

In *Kingsbury v. Burnside*, 58 Ill. 324; s. c., 11 Am. Rep. 67, this language is referred to with approbation. And it was there, among other things, said, after alluding to the rule that the delivery of a deed duly executed and acknowledged to the register, aided by the subsequent possession of the deed by the grantee, might be evidence of a delivery to him. "But here, the delivery of it at the recorder's office is not aided by a subsequent possession of it by the grantee. There is not only no evidence that he ever had possession of it, or of circumstances tending to that conclusion, but it appears affirmatively that he never had." And this is precisely, as we have seen, the case here.

Wiggins v. Lusk, 12 Ill. 136, in its enunciation of general principles, follows *Herbert v. Herbert, supra*.

But counsel for appellants assume that the same amount of proof is here requisite to show that there was no delivery, that

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would be requisite to establish that fact, where the grantee is in possession of the property claiming under a deed duly recorded and in his possession. To impeach the delivery, in such a case, would undoubtedly require an amount and character of evidence sufficient to impeach the execution of the deed if attacked in any other respect. But that is not the present case. The grantee here is not shown to be in possession of the property, nor is the deed found in his possession. He is not in possession of the property, and the deed is found in the recorder's office,—and in this regard there is no conflict in the evidence.

The mere act of recording, alone, as we have seen, is but *prima facie* evidence of a delivery, and liable to be rebutted; and it is successfully rebutted, as all the cases agree, when it is shown that the deed was not in the nature of a family settlement, or of a gift to a minor (as to which hereafter), but is intended to confer no benefit upon the grantee; and its execution and recording are wholly unknown to him until after the death of the grantor.

Again, it is assumed that the present case is different, in principle, from those we have referred to, because the certificate of acknowledgment of the present deed follows the form of our statute, and uses the word "delivered," while in those cases that word does not thus occur.

It is a sufficient answer to this, that the proof here is clear by the evidence of two witnesses—that of McEwen and Mrs. Campbell—that the deed was not in fact delivered at or before its acknowledgment.

The strongest case seemingly in favor of appellants is *Rivard v. Walker*, 39 Ill. 413.

In that case a father executed a deed to his minor children, left it with the magistrate before whom it was acknowledged, directing him to leave it at the recorder's office for record, which the magistrate did. Subsequently the father called upon the recorder, paid him his fee for recording the deed, and told the recorder not to deliver the deed to any one but himself, except in the event of his death, but in that event, to deliver it to the grantees.

Now, it will be noticed, right here, that case is distinguishable from the present in this: Here the grantee is not a minor—is not related to the grantor—and no directions were given the recorder or any one else in regard to the delivery of the deed. The court in that case refer to *Bryan v. Wash*, 2 Gilm. 563, and *Masterson v.*

Cheek, 23 Ill. 72, and apply the rule recognized by them, that "the law presumes much more in favor of the delivery of deeds, in the case of voluntary settlements, especially when made to infants, than it does between parties of full age, in ordinary cases of bargain and sale," and the court proceed to say: "For in this case, the bill shows upon its face that the complainant (the grantor) intended to part with the title to his lands for the purpose of placing them where they would be beyond the reach of debts contracted by his spendthrift wife, and secured for the benefit of his children. Both of these objects are avowed in the bill, and yet they would not have been accomplished if the deed, which was made upon a consideration of one dollar, and natural love and affection, had not been intended to take immediate effect. Such being the intention of the grantor, he evidenced and consummated it by delivering the deed to the magistrate without any species of reservation, and directing him to have it recorded. This in behalf of infant grantees, and when explained, as it is by the averment in the bill, will be regarded as an absolute delivery for the benefit of the infants, and the fact that the grantor afterward manifested to the recorder an intent not to part with all control over the deed, cannot relieve him from the effect of such absolute delivery."

In *Bryan v. Wash*, referred to in that opinion, the court said: "It must be remembered that the law presumes much more in favor of the delivery of deeds in case of voluntary settlements, especially when made to infants, than it does in ordinary cases of bargain and sale. The same degree of formality is never required, on account of the great degree of confidence which the parties are presumed to have in each other, and the inability of the grantee frequently to take care of his own interests."

In the other case referred to — *Masterson v. Cheek* — the court said that all the cases referred to on the question of delivery were reconcilable on the consideration that the intention was and must be the controlling element, adding "In a case like this where the conveyance was voluntary, and to an infant who died before he reached an age to assent or accept the conveyance, a delivery and acceptance will be more readily presumed than in the cases to which reference is made by appellant's counsel."

In *Kingsbury v. Burnside*, *supra*, the court, after discussing the rule under consideration, say: "But that the principle underlying it is, after all, assent, presumptive or actual, on the part of the

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grantee." And in all cases where the deed, instead of conferring a benefit, imposes a burden or duty, the law, in the absence of express assent or acceptance, will not presume to that effect.

It is clear here, from all the evidence, that the purpose of Campbell in making this deed was to put the property of McEwen in trust for the family of the grantor. McEwen so understood it, and Mrs. Campbell testifies that such was his expressed purpose in making the deed.

Whether he intended to take an express declaration from McEwen of the trust upon which he held the property, or to rely upon his honor, can now only remain matter of conjecture. His design, doubtless by reason of his unfortunate mental condition, was never consummated, whatever it may have been. He failed to perfect the delivery, and McEwen, never having had the deed either actually or constructively delivered to him, could not, of course, accept it, and become bound legally or morally to execute the trusts it was designed for.

[Omitting other considerations.]

The decree below is, in all things, affirmed.

Decree affirmed.

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(96 Ill. 533.)

Statute of frauds — lease — rent to be settled by arbitration — notice of hearing.

An agreement, in a written lease, for the renewal thereof, and to pay as rent for such renewal term, a certain percentage upon the cash value of the premises, to be fixed by appraisers, is not within the statute of frauds.

Such appraisement is not an arbitration, and the parties are not entitled to notice of hearing, and the appraisal is conclusive, unless fraudulent. (See note, p. 179.)

ACTION for rent on three leases, for certain terms and at fixed rents, and containing the following clause:

"And the party of the second part further agrees that at least thirty days before the expiration of said first five years he will choose one disinterested holder of real property of the city of Chicago, and notify in writing said party of the first part, or his agent or attorney, of such choice, and party of the first part will

thereupon choose a like holder of real property, which said two parties shall at once proceed to appraise the cash value of said premises, exclusive of all improvements thereupon, and in case they cannot agree upon the same, shall choose a third disinterested holder of real property, and the award of the majority of the appraisers shall be final and binding; and thereupon, for the next succeeding five years from the end of said first five years, said party of the second part will pay as rent for said premises, quarterly as aforesaid, a sum for each and every year of said five years equal to six per cent per annum on the appraised value of said premises."

Appraisers were accordingly selected and they fixed the value of the premises, and the plaintiff claimed that under this appraisal, there was due for the first quarter of the second five years, \$1,125, to recover which the action was brought. The plaintiff had judgment below.

Miller & Frost, for appellant. A verbal lease of land for a term exceeding a year is void. *Olt v. Lohnas*, 19 Ill. 576; *Granjang v. Merkle*, 22 id. 249; *Wheeler v. Frankenthal*, 78 id. 124.

The entire contract, including the price, must be in writing. *Wood v. Davis*, 82 Ill. 311.

If made by an agent, his authority must be in writing. R. S. ch. 59, p. 540, § 2.

The contract upon which the recovery was had was incomplete until the price (an essential part of it) was agreed on or fixed by the arbitrators under a written submission. What the parties could not do verbally, could not be legally done by arbitrators under a verbal submission. *French v. New*, 28 N. Y. 147, 150.

Such a verbal agreement would have been a nullity. "A verbal submission is valid in all cases where the subject-matter is such that a verbal agreement directly between the parties in the terms of the award would prevail. But where the law, as for instance the statute of frauds, requires a contract to be in writing, then both the submission and the award must be in writing." *Cadwell on Arbitrations* (Vt. ed. 1853), 36.

Walker & Carter, for appellee.

SCHOLFIELD, J. The first objection urged against the judgment below is, "our statute says that no action can be brought upon a

contract of this kind unless the contract shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party;" and it is thereupon argued that the appointment of the arbitrators is a necessary part of the submission,—that the submission cannot be said to be made until the persons to whom it is made are selected.

The objection is not well urged. All of the terms of the contract upon which suit is brought, required by the statute of frauds to be in writing, are in writing. The amount to be paid per annum for the first five years is specifically expressed. The amount to be paid after the expiration of that period is six per cent on the appraised value of the premises,—that is to say, on the "value of the premises." Suppose the language had been simply to pay six per cent on the value of the premises? Surely, that would have been sufficiently definite and certain to have answered the requirements of the statute. The provision with reference to the appointment of appraisers relates solely to the mode of making proof of value, and is certainly as competent as any other mode of proof of value.

It is said in *Brown on Statute of Frauds*, § 378: "It is quite obvious that the statute will be satisfied by such a statement as ascertains the price to be paid, although it mentions no specific sum,—as for instance, if the agreement is to pay a price to be settled by arbitration, or to pay the same for which the property had been previously purchased."

In *Brown v. Bellows*, 4 Pick. 178, it was referred to referees to fix the price to be paid for the property. The referees were not named in the indenture, but it provided that they were to be thereafter chosen. As against the plea of the statute of frauds it was held that after the price had been fixed by referees, chosen pursuant to the indenture, it was too late for the defendant to object, that by the statute of frauds, the indenture was invalid, because the referees and the price were not ascertained by the indenture itself.

Whether the reference here be called one to arbitrators or simply to appraisers, can, so far as this question is concerned make no difference. The rule controlling is, "*id certum est quod certum reddi potest*," and has nothing to do with the name by which the third party, to whom the valuation is left, shall be called.

The next, and most serious objection urged against the judgment

below, is, that the stipulation to refer the question of the value of property to holders of real property in Chicago, as provided in the leases, is a submission of that question to arbitrators, and that the valuation made by Clark and Fuller is an award and not merely an appraisement; and being an award, it is void, because made without notice to the parties to the submission, — and after refusal to hear appellant's witnesses on the question of value, and argument thereon by his counsel, which evidence and argument, it is claimed, would have shown that the valuation, as made, is unjust to him. There was no evidence introduced, or offered, showing that the valuation, as made, was not the honest expression of the judgments of the appraisers, and the only question, in reality, is, was appellant entitled to notice and to be heard on the question of value? If he was not, there is nothing in the evidence introduced or offered, showing objectionable conduct in the appraisers.

In one or more of the pleas there may be allegations of fraud, but there was no attempt to support such allegations by proof. And the instructions asked only go to the question of the right of appellant to notice, and to be heard by witnesses and counsel.

The authorities upon the question of notice are not entirely harmonious. In some cases in New York, and notably in *Peters v. Newkirk*, 6 Cow. 103, and *McMahon v. New York and Erie Railroad Co.*, 20 N. Y. 463, rulings may be found sustaining the position of the appellant. But the authority of *Peters v. Newkirk* is much impaired by what is said in reference to it in *Elmendorf v. Harris*, 5 Wend. 521. It was there said: "As to the appraisement referred to in *Peters v. Newkirk*, it could hardly be dignified with the name of an award. Even if it should be so considered, it was not made the foundation of an action." And so what was said in regard to notice, however correctly or incorrectly, was *obiter dicta*. And in *McMahon v. New York and Erie Railroad Co.* there was a provision in the contract requiring the work to be done under the direction and supervision of the engineer, and providing that he should decide every question that might arise between the parties, and that his decision should be final. It was held that his position was not unlike that of an arbitrator, and that his estimates would not be binding, unless they were made upon notice. But this, in principle, is in conflict with the ruling of this court in kindred cases.

In *McAuley v. Carter*, 22 Ill. 53, the parties to a building contract agreed that the superintendent should pass upon the work and

certify as to the payments to be made. His decision was held to be binding unless fraud or mistake on his part should be shown, and it was also held that notice need not be given of the certificate obtained from the superintendent where the contract does not require it.

Korf v. Lull, 70 Ill. 420, follows, and approves *McAuley v. Carter*, and overrules what was said in *Packard v. Van Schoick*, 58 Ill. 79, requiring notice in such cases.

There may be found other cases besides those to be found in the reports of New York, affording sanction to appellant's position, but we do not deem it important to refer to them in detail, and shall content ourselves with briefly referring to some authorities sustaining what we regard as the more reasonable rule.

In *Leeds v. Burrows*, 12 East, 1, the plaintiff was the outgoing and the defendant the incoming tenant of a farm, and it had been agreed between them that the referees should value the hay and the spike roll, for which the defendant was to pay, etc. "LE BLANC, J., observed that it was only left to the persons to whom the matter was referred to put a value upon the articles which the parties had already agreed should be paid for."

In note "a," at the conclusion of the report of the case, it is shown that after a second trial the case came before Lord ELLENBOROUGH, C. J., on a motion for a nonsuit, upon the ground that the agreement included a reference of a right of action for damages, etc., and he said "that it was only appointing persons to settle an account of what was due between the parties for the value of the different articles. The parties had no contemplation of submitting any differences to the award of arbitrators, and no such terms ought to be imposed upon them against their own meaning and the meaning of the stamp acts."

In *Lee v. Hemingway*, 3 Nev. & M. 860, there was an agreement to sell land at a particular price, to be fixed by award. The price was fixed, and one party applied for an attachment under the award, claiming that it was an arbitration; but LITLEDALE, J., held otherwise, observing: "It is not properly an arbitration; it is in effect an agreement to sell the land, and this is not a settlement of any difference between the parties, but merely something auxiliary to the contract entered into between them for the purpose of the sale of the land, and accordingly upon a breach of the contract you have your remedy, for it is clear that a specific performance would

have lain here in that case. It is clear also that an action would have lain for damages. But not being an award because it was not a matter in difference that was referred by these parties, you cannot have it by way of attachment."

In *Collins v. Collins*, 26 Beav. Ch. 306, there was a written contract that the purchase-money of all the premises agreed to be sold should be determined by Mr. Mason for the vendor and Mr. Moss for the purchaser, and that they should choose an umpire before entering upon a valuation.

The Master of the Rolls said: "It appears to me that the case of *Leeds v. Burrows* draws the proper and fit distinction between an arbitration, in the proper sense of the term, and an appraisalment or valuation, for valuation undoubtedly precludes differences in the proper sense of the term; it prevents differences, and does not settle any which have arisen."

Russell, in his work on Arbitration (3d ed.), p. 43, after referring to these cases, says: "The valuer, etc., is not an arbitrator in the proper sense, unless there have been differences between the parties on the point previous to their submitting it to his decision. A decision which precludes differences from arising instead of settling them after they have arisen is for many purposes not an award." See Morse on Arbitration and Award, 40.

In *Garred v. Macey*, 10 Mo. 161, the agreement provided that in consideration that A. shall give possession of certain public land to B., B. shall pay the value of the improvements, to be ascertained by five householders. It was held that the decision of the persons thus selected was not an award.

In *Curry v. Lackey*, 35 Mo. 389, the agreement was to leave to a third person, to determine the value between two slaves exchanged. It was held this did not make such person an arbitrator. The court said: "A reference to arbitration occurs only where there is a matter in controversy between two or more parties."

See, also, to a like effect, opinion of Senator SEWARD in *Garr v. Gomez*, 9 Wend. 649; *Mason v. Bridge*, 14 Me. 468; *Oakes v. Moore*, 24 id. 214; *Rochester v. Whitehouse*, 15 N. H. 468.

There was here no matter in controversy when the leases were executed, or for that matter, when the appraisers were selected, and the object was to preclude or prevent the arising of differences, and not to settle the differences which had arisen.

The reason that notice of the time and place that arbitrators in-

tend to act upon the matter submitted to them is required, is to enable the parties to present their case by evidence and by argument. Morse on Arbitration and Award, 117. And so notice of the meetings of the arbitrators for the purposes of deliberation and making up the award need not be given, since the parties are not expected to attend. Id. 118.

But where the office of the party to whom the submission is made is limited to a simple appraisal of value, he is expected to act on his own knowledge and opinions only. And hence, neither evidence of witnesses nor statements of parties or counsel is contemplated. 2 Para. on Cont. (6th ed.) 706, note n; *Eads v. Williams*, 31 Eng. L. and Eq. 203.

By the express terms of the leases, the persons to be selected here are not to ascertain and determine, from witnesses or otherwise, but simply to "appraise the cash value of said premises," etc. They are to be disinterested holders of real property of the city, and one is to be selected by each party. So it is to be presumed, the design was to select those who would need no evidence or argument, but be prepared at once to make a valuation. The language used precludes delay, and requires those selected to "at once proceed," not to inquire or hear evidence or argument, but "to appraise," that is to say, fix a valuation on the property. The language, in our opinion, as plainly means this as any language that might have been employed could.

Conceding that we are right in holding that under this language appellant would not have been entitled, as a matter of right, to have introduced witnesses, or have been heard, by himself or counsel, on the question of the value of the property, it is quite clear that he was not entitled to notice, for it cannot be that a party is entitled to a notice which will enable him to exercise no right or privilege.

We think the judgment of the Appellate Court was right, and it must therefore be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — DICKEY, J., delivered the following dissenting opinion :

"I cannot concur in this judgment or the reasoning on which it rests. For many purposes, this proceeding was not an arbitration, and the award of the appraisers is not such an award as spoken of in our statutes concerning 'Arbitration and Awards.' It was, however, a matter to be determined between the parties by the judgment of the appraisers; a determination by which the parties were to be bound, as by the judgment or decree of a court. In other words, the conclusion reached was to become and be *res judicata*, as to the then value of this property. In all such cases, whether the proceeding be before a

court, or before arbitrators or referees or appraisers, or before any other forum, I think the party to be affected thereby is entitled to be heard, if he demand it, and to that end is entitled to notice of the time and place of deliberation or investigation. A party may, no doubt, by contract or otherwise waive this right to notice, and that is the ground on which the cases, as I understand them, of *McAuley v. Carter*, 22 Ill. 53; *Korf v. Lull*, 70 id. 420, and like cases, rest, in which it is held notice need not be given in cases of building and construction contracts, where the matter to be determined was left to the engineers, superintendent or architect. In that class of cases, in view of the nature of the business, and of the fact that the question was left to the decision of an expert, whose ordinary duties, in the nature of things, gave him the full means of understanding the matter to be by him determined, it was held that by a fair construction of the contract the parties had waived this right to notice. In these decisions I fully concur. They do not invade the fundamental principle of common fairness and justice which pervades the law in all civilized communities, and which demands that in all proceedings—judicial or quasi judicial—the party to be bound thereby must have an opportunity to be heard, unless he has expressly or by reasonable or necessary implication waived that right."

"This view of the law has for its support decisions where this very question came in judgment.

"In *Peters v. Newkirk*, 6 Cow. 103, it appeared that Newkirk had leased to Peters certain premises for a period of three years, but before the time expired the parties agreed to cancel the lease and make a settlement of their accounts. The balance of rent due to Newkirk was agreed to be \$87.75, for which Peters gave his due bill, and it was also agreed that Newkirk should take a shearing machine, to be appraised by C. Sturges, in part pay of the due bill. Sturges made the appraisal at \$85 in the absence of Newkirk, who was not notified. Subsequently Newkirk made a distress for the \$87.75 rent due, whereupon Peters tendered the balance of rent due, after deducting the \$85, and demanded a return of the goods, which was refused, and he then brought an action on the case, for distraining his goods when no rent was in arrear, and upon the trial of this action the question arose whether the appraisal was valid, and upon this point the court say: 'The appraisal was irregular and not conclusive on the defendant. Both parties should have had notice, so that an opportunity might be afforded to submit their remarks to the appraiser, and adduce proof if deemed necessary. The plainest dictates of natural justice require that no man shall be condemned unheard. The right to notice was implied in the agreement to submit.'

"In *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339, the defendants leased to Underhill a mill place and land for twenty-one years, and in the lease it was provided, 'that at the expiration of the term the mill or mills then standing, and whatever might appertain thereto, should be appraised or valued by two persons indifferently chosen by the parties, and in case of their disagreement, by a third person, to be chosen by the two, and the said appraisement should be binding on the parties.' Chancellor KENT, in his opinion, treats this agreement precisely as a submission to arbitration, and he applied to their conduct the same rules which are applied to the conduct of arbitrators.

"In *Kelly v. Crawford*, 5 Wall. 785, there was an agreement between two firms that an accountant should examine their books of account, and ascertain from them the exact amount due from one firm to the other, 'the amount so found to be due and owing to be final.' It was held the agreement was not a submission to arbitration, nor was the amount found due by the accountant an award, in any such sense as would make them subject to the strict rules governing arbitrations and awards. The court made a distinction between a case where there is something submitted to the judgment or discretion of the person chosen, and one where he is to have no discretion.

"In *Thomas v. West Jersey Railroad Co.*, 24 N. J. Eq. 568, provision was made in a lease that it might be terminated by notice, and provision was made for determining, by arbitration, the damages to which the lessees might become entitled by the determination of the lease. The notice was given, and two arbitrators chosen, who, after hearing evidence and arguments, were unable to agree, and thereupon chose an umpire to act as third arbitrator. The three then met without notice to the parties, or giving them any opportunity to be heard. This action was held by the court to be misconduct, in the sense of the law, and fatal to the validity of the award.

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"In *Bushey v. Culler*, 26 Md. 534, it appeared there had been a suit pending between the parties which was compromised by a contract, which provided Culler, who had a dam which caused the water to flow back upon Bushey's mill and land, should lower his dam to such an extent as should be judged necessary by Samuel Hargate and George Thomas, they to select a third person, in case of disagreement, who should determine how much the said dam should be lowered, and whose determination should be final and conclusive; and it was further provided, that at any time, within one year from such determination, Bushey should think the dam had not been sufficiently lowered, he might again apply to the arbitrators, who should examine the matter and make another determination. Under this contract the arbitrators made a decision requiring the dam to be lowered six inches, which decision was made without giving notice to either party, and without either party being present. The court held the decision was not valid, and, following the case of *Bullitt v. Muagrave*, 3 Gill, 32, said: 'Where, from the nature of a submission, the judgment of arbitrators may be influenced or enlightened by the adductions of evidence, the parties are entitled to notice of the time and place of their proceeding to investigate the matters submitted to them.'

"In *Dickenson v. Railroad Co.*, 7 W. Va. 390, a contract for the sale of land in Nicholas county, Virginia, provided that the vendor should convey it to the vendee 'at so much per acre, as may be determined by Messrs. George Brown, Samuel J. Grose and Joseph Copenhaver, being disinterested and responsible land-owners in the said county, the price per acre to be certified by them on the back of this agreement.' The persons named in the contract made their valuation without notice to, and without the presence of, the vendee. The court held the valuation not binding, and the learned judge who wrote the opinion said: 'The certificate of valuation cannot be considered as more solemn, more conclusive or binding upon the parties than an ordinary award. It is but an award, and the referees cannot upon principle be considered otherwise than as arbitrators.' After citing and quoting from a large number of authorities, the opinion continues: 'From the weight of authorities upon the subject, and from such reflection as I have been able to exercise, my mind has been brought to the conclusion that sound principles, justice and a due regard for the proper administration thereof among men by arbitration, require, ordinarily, though not universally, in equity, that an award made by arbitrators in the absence of the parties to the submission * * * may be set aside in equity.'

"In *Billings v. Billings*, 110 Mass. 225, a question arose between two parties as to the construction of a will, and they agreed to refer the point for decision to Henry Chapin, Esq. The referee made his decision without notice and without giving the parties an opportunity to be heard, and the court held his decision was void.

"In *Brown v. Lyddy*, 11 Hun, 451, a lease provided that in case of the renewal of a lease the rent, if not agreed upon by the parties, was to be ascertained as follows: Each party 'shall choose a disinterested person to ascertain the same, which persons so chosen shall themselves, respectively, be owners in fee simple of one or more lots of land in the neighborhood of the one hereby demised, and shall, in making their award or determination in the said premises, under oath, appraise and value the said lot or lots of land hereby demised, at its or their full and fair worth or price at private sale,' etc., and it was also provided that in case the two could not agree an umpire was to be chosen by them whose decision under oath should fix and determine the value. The two arbitrators chosen failed to agree, and chose an umpire, who made his award without having given the parties notice of the time and place of hearing, and without taking any proofs. Upon this point the court say: 'The appraisers were to ascertain the value, but in what manner is not stated, whether by the exercise of their own knowledge and judgment or by a hearing, at which the parties could produce witnesses. The word 'ascertain,' however, has its meaning, and therefore its force. 'To make sure or certain; to fix, to establish, to determine; to settle,' are definitions of that word according to Worcester, and this would seem to demand the observance of the usual mode of investigation in order to determine—to settle the value. 'The right of the parties to a hearing * * * is one of the established privileges, although it may be waived by them. The courts would not declare that such right did not exist, unless the terms of the submission so provided or a waiver was clearly demonstrated.'

"There are other cases carrying this doctrine farther, holding that even where by the

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agreement of the parties the amount or value of work done under a contract is to be determined by an engineer or other expert, a determination made by him without notice to the parties will not be binding. Among these are the following: *McMahon v. New York & Erie Railroad Co.*, 20 N. Y. 463; *Collins v. Vanderbilt*, 8 Bosw. 313. On this latter question the authorities are not in harmony, and this court has taken a different view, and in which I fully concur. But my attention has not been called to any case where matter requiring the exercise of judgment and discretion (on the part of the persons by whose judgment the parties have agreed to be bound), and such persons are not selected as experts, in which the decision of such persons has been held binding upon a party who has not had an opportunity to be heard."

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(96 Ill. 593.)

Surety — on official bond signed and delivered in blank — effect of not filing in specified time — entries of principal as against surety.

One who as surety signs and delivers an official bond with blanks as to the name and term of office, the penal sum, date, names of other sureties, and the like, impliedly consents that such blanks may be subsequently filled by the principal, and the obligee's knowledge that the bond was thus delivered does not prevent his recovery upon it, although the penal sum inserted was greater than that limited by the oral agreement of the surety and principal.*

A statutory provision that an official bond shall be filed within a specified time or the officer shall be deemed to have refused the office, and the same shall be filled by appointment, is merely directory.

Where a financial officer is his own successor, his entries of balances in his hands at the expiration of his first term, made in pursuance of legal requirement, are conclusive on himself and his sureties on his bond for the new term.

ACTION of debt against principal and sureties, upon a city treasurer's bond, given on his re-election. When signed and delivered the bond was blank as to names of other sureties, penal sum, date, name and term of office, and was signed by some of the sureties with the declaration that they should not be bound if the penalty exceeded a certain amount, nor unless the co-sureties were satisfactory. The penalty exceeded the specified amount, and all the blanks were filled, and the execution completed without consultation with the sureties. The city charter provided that all

* Consult *Allen v. Marney* (65 Ind. 306), 38 Am. Rep. 73; *Nash v. Fugate* (32 Gratt. 564, 34 Am. Rep. 730).

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bonds required from city officers should be filed within fifteen days after election or appointment, or in default thereof the officer should be deemed to have refused the office, and the same should be filled by appointment in a certain manner. The opinion states other facts. The plaintiff had judgment below.

Francis Adams and Sidney Smith, for appellant.

Wait Dexter, Lawrence, Campbell & Lawrence and John N. Jewett, for appellees.

SHELDON, J. It is insisted by appellants that the instrument in question is a nullity as to the sureties, they having signed it with the blanks in it which it had, and those blanks being subsequently filled without their consent or knowledge, and the case of *People v. Organ*, 27 Ill. 29, is referred to in support of the position. That case does decide, that the filling the blank in a bond with the amount of the penalty, after the sureties had executed it, without their knowledge or consent, rendered it void, as to them. But that decision was made under, and in conformity to, the ancient doctrine of the common law that an authority to execute a sealed instrument for another must be of as high a character as the instrument, and therefore that a parol authority was not adequate to authorize an alteration or addition to a sealed instrument; the decision recognizing as the rule that a paper signed and sealed in blank, even with verbal authority to fill the blank, which is afterward done, is void as to the parties so signing and sealing, unless they afterward deliver, or acknowledge, or adopt it. Among the cases there cited in support of the decision was that of *United States v. Nelson*, 2 Brock. 64, decided by Chief Justice MARSHALL. That was the case of a paymaster's official bond. There were blanks there which were filled after signing, and they were identical with those here, to wit: amount of penalty, names of sureties, date, and name of office. The question was whether authority to fill the blanks should be implied, and that great judge, with much hesitation, held that it should not. But he admitted that express authority would have been sufficient, and asserted that but for the ancient distinction between sealed and unsealed instruments in this regard, implied authority would exist; that *Speake v. United States*, 9 Cr. 28 (where an express parol authority had been declared

sufficient), undoubtedly went far toward establishing the sufficiency of implied authority in such cases, and he predicted that the Supreme Court would probably completely abolish the distinction in this particular between sealed and unsealed instruments, and concluded his opinion as follows: "I say with much doubt, and with a strong belief that this judgment will be reversed, that the law on this verdict is in my opinion, with the defendants." The prediction, as will be seen, has been verified, though the judgment was not reversed, the case not having been carried any further.

In *Smith v. Crooker*, 5 Mass. 538, Chief Justice PARSONS, in the case of the official bond of a town treasurer, laid down the rule in general terms, that a party executing a bond "knowing that there are blanks in it to be filled up by inserting particular names or things, must be considered as agreeing that the blanks may thus be filled after he has executed the bond." Although that was but the case of the writing in of the name of the surety after he had signed the bond, the rule is laid down generally, and is the one which courts subsequently have declared, and which agrees with, as we consider, the now prevailing doctrine.

Butler v. United States, 21 Wall. '272, decided by the Supreme Court of the United States in 1874, was a suit upon an internal revenue collector's bond in the penalty of \$15,000, executed by Emory as principal, and by Butler and others as sureties. Butler pleaded that when he signed and sealed the bond it was a printed form, with names, dates and amount of penalty in blank; that he delivered it to Emory under an express agreement that the latter should fill the blanks with a penalty of only \$4,000, and procure two other sureties in the District of Columbia, each worth \$5,000, otherwise the bond was not to bind Butler, and not to be delivered, but returned to him. That Emory fraudulently filled the bond with a penalty of \$15,000, and with two additional sureties, neither of whom resided in said district or was worth \$5,000, but insolvent. This plea was held bad.

The court say: "Every blank space in the form was open. To all appearances any sum that should be required by the government might be designated as the penalty, and the names of any persons signing as co-sureties might be inserted in the space left for that purpose. It was easy to have limited this authority by filling the blanks, and the filling of any one was a limitation to that extent. By inserting in the appropriate places the amount of the penalty,

or the names of the sureties or their residences, Butler could have taken away from Emory the power to bind him otherwise than as thus specified. This, however, he did not do. Instead, he relied upon the good faith of Emory, and clothed him with apparent power to fill all the blanks in the paper signed in such appropriate manner as might be necessary to convert it into a bond that would be accepted by the government as security for the performance of his contemplated official duties. It is not pretended that the acts of Emory are beyond the scope of his apparent authority. The bond was accepted in the belief that it had been properly executed. There is no claim that the officer who accepted it had any notice of the private agreement. He acted in good faith, and the question now is, which of two innocent parties shall suffer? The doctrine of *Davis'* case is, that it must be Butler, because he confided in Emory and the government did not. He is, in law and equity, estopped by his acts from claiming, as against the government, the benefit of his private instructions to his agent."

We have quoted thus at length from the fact that this case so fully covers the ground of the case before us, and enunciates the modern doctrine of courts upon this subject, especially in respect of official bonds, and see *Dair v. United States*, 6 Wall. 1; *Drury v. Foster*, 2 id. 24.

Inhabitants of South Berwick v. Huntress, 53 Me. 89 (1865), was an action upon a collector's official bond. It is a very well considered case and is directly in point, holding "that a party executing a bond knowing that there are blanks in it to be filled up, necessary to make it a perfect instrument, must be considered as agreeing that the blanks may be thus filled after he has executed the bond," and that this rule extends to the filling up of the blank for the penal sum in the bond, remarking upon the penalty being viewed as almost a matter of form, the condition being the essential portion embracing the real obligation.

The same doctrine of implied authority in such case was also asserted in the case of *State v. Pepper*, 31 Ind. 76 (1869).

McCormick v. Bay City, 23 Mich. 457 (1871), was a suit upon a bond given to secure the official conduct of the comptroller of Bay City. McCormick, one of the sureties, offered to prove, as a defense, that McKinney, the principal, induced him to sign the bond while the names of the sureties and the penalty were in blank, but under an agreement that he was not to use it unless he obtained

certain specified sureties, and that he delivered the bond contrary to this agreement. But this was held to be no defense, on the ground that McCormick made McKinney his agent to complete and deliver the instrument, and having authorized his agent by visible authority to fill up and deliver it, and the only limit to his apparent authority being by secret instructions, he was bound by McKinney's acts.

The court say : " We have, then, a case of a person who has entrusted another with power to fill up and ~~procure~~ signatures to, and deliver an official bond, and taken no steps to prevent an abuse of his agency, and we have, as a consequence, the acceptance of the bond without negligence, and the obtaining by means of it of an important public office, and the control of public funds. We can conceive of no stronger case for the doctrine of estoppel, and we approve the rules recognized in *State v. Pepper*, 31 Ind. 76, and cases there cited, and in *State v. Peck*, 53 Me. 284, and *Inhabitants of South Berwick v. Huntress*, id. 89."

In the case of *State v. Young*, 23 Minn. 551 (1877), in a suit upon the official bond of a county treasurer, the bond had been signed by the sureties with a blank in the place for the penal sum, and by the principal delivered to the county auditor, and afterward the blank was filled by the county auditor by the direction of the board of county commissioners with the sum of \$25,000, in the absence of the sureties. The sureties were held liable, the court holding that parol authority is sufficient to authorize the filling of a blank in a sealed instrument, and that such authority may be given in any way by which it might be given in case of an unsealed instrument; that such authority may be implied from circumstances; that there was there an apparent implied authority to the board upon which they had a right to act; that the sureties were estopped from denying the existence of the apparent and presumptive state of facts which they, by their conduct, had authorized the board to believe and act upon; and that the apparent authority with which they clothed the board must be held to be the real authority.

These authorities declare the now prevailing rule upon this subject, and the reasons of the rule. They sufficiently show that the courts have entirely drifted away from the decision in the case of *People v. Organ*. Or rather, perhaps it may more properly be said, that the old technical rule of the common law upon which that decision was based has become overborne in operation, in this re-

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spect at least, of filling blanks in official bonds, by the application of the doctrine of estoppel *in pais*, a principle, at least in its present broadness of scope, of modern growth. The first distinctive enunciation in England of the branch of estoppel, known as estoppel by conduct, is said to have been in *Pickard v. Sears*, 6 Ad. & E. 469, and in this country in *Welland Canal Co. v. Hathaway*, 8 Wend. 480. See Bigelow on Estoppel, 473, 476.

This court has since departed from that case of *People v. Organ*, and placed itself in harmony with the class of authorities which have been cited.

In *Bartlett v. Board of Education*, 59 Ill. 364, the official bond of the treasurer of a school district had been signed by the sureties with a blank in it for the penalty, and the blank was afterward filled by the principal obligor with the amount of the penalty, in the absence and without the knowledge or consent of the sureties, and the bond was held valid as to them on the ground that it might be inferred from the circumstances that the sureties authorized the filling of the blank.

This decision was based upon a different line of authorities from those in the former case, and in repudiation of the old rule then acted upon; among the authorities on which the last decision was based being the case of *Texira v. Evans*, referred to in 1 Anst. 228, where Evans, wanting to borrow money, executed his bond with blanks for the name and sum, and sent an agent to raise money on the bond. Texira lent £200 on it, and the agent accordingly filled up the blanks with that sum and Texira's name, and delivered the bond to him. On *non est factum* pleaded, Lord MANSFIELD held it a good deed; that parol authority to fill the blanks was valid.

In *Smith v. Board of Supervisors*, 59 Ill. 412, the official bond was signed by the sureties and left with the principal obligor and he delivered it to the obligee in violation of a secret understanding between himself and the sureties, not known to the obligee, and the instrument was held binding upon the ground that the possession of the bond so signed clothed the principal with apparent implied unqualified authority to deliver the bond, and therefore the obligee was justified in treating with him as in fact having such unqualified authority; and see *Comstock v. Gage*, 91 Ill. 328.

The filling up of all the other blanks in the bond in suit, except that for the penalty, was but mere form. It is said the name of the office was not stated, and that so there was an uncertainty what

office it was, in respect to which the bond was given. There was none at all. The surrounding circumstances are always admissible to show and explain the meaning of a written instrument. Reading this bond as it was signed, in the light of the surrounding circumstances, there could be no possibility of doubt that the office intended was that of treasurer of the city of Chicago. The bond itself, too, recited that the office was one "in and for the city of Chicago" to which the "above bounden" had been elected or appointed; and it was to the office of treasurer of that city to which the first "bounden" in the bond, to wit, Gage, had just been elected. The provision of law for the fixing of the amount of the penalty strengthened the inference in this particular case of an implied authority to fill the blank for the penal sum, it not being one to be fixed by agreement of parties as in the case of ordinary bonds. By the law the amount of the penalty was to be determined upon by the common council, to be fixed by them in such amount—not less than \$200,000—that they deemed the safety of the interests of the city required. Some of the cases cited remark upon the penalty being in a certain sense almost a matter of form. The condition of the bond is the essential feature of it; it states what the sureties undertake for, and what they are liable for. The penalty but limits the amount of the damages which can be recovered from them for the breach of their undertaking.

Appellees claim that there was notice here on the part of the city of the secret understanding of the sureties, or one of them, that the penalty of the bond was not to be more than \$250,000. If such were the fact we would agree with them as to the fatal effect. The disagreement is in regard to what facts will constitute such notice. It is claimed that the notice to Hotchkiss, the city clerk, to Holden, the alderman, and to Clyde, the clerk in the office of the corporation counsel, that the blanks in this bond were filled subsequently to the signing of the bond by the sureties, and in their absence was notice to the city of such fact, and that that would be sufficient notice to the city of the secret condition upon which the sureties signed the bond.

Waiving the question whether the knowledge by the persons named, of such signing in blank and subsequent filling of the blanks, would be notice of such facts to the common council, who were the body appointed by law to approve and accept the bond, and thus notice to the city, we will assume that it would. But we

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cannot then assent to the view taken, that the knowledge by the city of those facts affected the city with notice of the secret condition upon which the sureties signed the bond.

The position taken is, that any material defect whatever apparent upon the face of the bond is sufficient to give notice of the actual facts respecting the condition of the execution of the bond. There were several defects here apparent upon the face of the bond, but no one of them, that we can see, should affect the obligee with notice that it was the understanding of the sureties that the penalty of the bond was not to be more than \$250,000, or put them upon inquiry on the subject to ascertain whether it was not to be any larger than that. Surely, the lack of a date in the bond would not do so; nor the absence of the names of the sureties in the body of the bond; nor the omission of the name of the office; and no more so, as we conceive, did the blank in the bond for the penal sum. This could not excite suspicion of there having been a limitation of the amount of the penalty. One could reasonably be led to infer no more from it, than that as by the law the amount of the penalty was to be fixed by the common council, the penal sum had been left blank to be filled in when the common council should have determined what the amount of the penalty should be. Under the decisions, the principal obligor had an apparent implied authority to fill up the blank, and the blank was filled by his direction.

The obligee was justified in assuming, and acting upon the assumption, that Gage really possessed the authority with which he was apparently clothed. Knowledge of the unfilled blank for the penalty was but knowledge of the implied authority to fill it; and consequently could be no ground of suspicion of the lack of authority. The imperfection upon the face of the bond which is to have the effect of the notice contended for, must, as we regard, be of such character, that it points toward, indicates, and excites suspicion of the particular matter of defense alleged against the instrument, and as an ordinarily prudent man, to put the obligee to make inquiry as to the existence of the very thing which is set up in defeat of the instrument — as in this case, the condition of the limitation of the penalty to \$250,000. Every one of the cases cited by appellees' counsel are cases of this character. All but two of them are of this class, namely: where in the body of the bond several persons are named as co-obligors, and it is signed by only a portion of the persons named in the bond as obligors, and it was

set up in defense to the bond by the signers, or a portion of them, that they signed the bond upon the condition and agreement that all or certain named of the obligors mentioned in the bond were to sign it before delivery, and that they had not done so. In such case the bonds purported to be the bonds of those who never executed them and indicated on their face that they had not been completed according to the original intention, and properly enough the obligees were held to be put upon inquiry whether those who had signed consented to the bonds being delivered without the signatures of the others who were named as co-obligors, the defect in the bond indicating on the face of the instrument the very thing which was set up in defeat of the bond.

Of the other two cases thus cited, one was that of the erasure of the signature of one of the sureties to a bond before its approval. The defense was this alteration of the bond. The alteration was apparent on the face of the bond.

The other case was that of a collector's bond being altered after its execution, by reducing the amount of the taxes to be collected without the knowledge or consent of the sureties. The alteration appeared upon the face of the bond, and was held notice to the parties receiving it.

Thus it will be seen that in every one of these cases the very matter of exception taken to the validity of the bond was indicated upon the face thereof, or the circumstance of incompleteness in the instrument pointed at and indicated on the face of the bond the existence of that particular secret condition or agreement which was set up as attending the signing of the bond, and as defeating it.

This is all that the exhaustive research of the very able counsel for appellees has produced in the way of authority in support of this last position, that a defect in a bond is notice, and we do not consider that the authorities at all meet the exigency of the present case.

The point in this respect of notice is not whether there was knowledge of the existence of these blanks unfilled, but whether there was notice of this secret understanding in regard to the amount of the penalty of the bond. It is in reality a question of good faith — whether these blanks in the bond indicated the existence of the secret understanding as to the amount of the penalty, and should have put the obligee upon inquiry whether the sureties

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consented to the delivery of a bond with a larger penalty than \$250,000. We do not think such a circumstance as the blanks in the bond was in any way indicative of such a secret understanding, or excited any suspicion of its existence, or put the obligee upon any inquiry as to such an understanding, and we must believe the obligee acted in entire good faith in taking the bond.

The cases cited by appellees' counsel do not, as we view them, decide any thing to the contrary. There may be found in one or more of them some such general expression as that the instrument when delivered must be perfect on its face, or otherwise the obligee is chargeable with notice of the facts, and cannot claim the benefit of this rule of protection; but such general observation must be taken with reference to the facts of the particular case, and as applying to an imperfection of the character there appearing; the defect in the case where the language was used being, as before said, that one whose name was in the body of the bond had not signed it.

The bond signed and sealed by the sureties was presented by Gage to the common council as his required official bond. The common council were not to suppose that the sureties had done a mere idle thing, or that they were dealing deceitfully with the council in tendering this bond for their acceptance, and having in reserve a secret understanding which should nullify the bond. But they had the right to think the sureties meant honestly, and intended that the instrument they had signed should be accepted as, and serve for, the official bond of Gage. And although there were the unfilled blanks in the instrument, they saw that Gage had implied authority to fill them in such appropriate manner as might be necessary to make it such that it would be accepted by the common council as Gage's official bond as city treasurer, as they were so informed by decisions of the highest courts in the land. Of course then the blanks in the bond were no indication of the want of authority, and could not put the obligee upon inquiry as to its existence.

Another point which is made against the validity of the bond is, that failure to file the bond within fifteen days after the canvass vacated the office therein described, and thereupon all liability under the bond terminated.

The position is, that the provision requiring a bond to be filed by the treasurer elect within fifteen days after the official canvass

has been declared is mandatory, and that a failure to file the bond within that time *eo instanti*, upon the termination of the time, absolutely vacates the office.

It is insisted on the contrary, that the sections of the charter on this subject taken together were intended merely to empower the mayor and council, in their discretion, to declare a vacancy and appoint a successor, or to waive the default as to the mere time of filing bond, and to accept and approve it when afterward filed; therefore, a failure to file in time does not, of itself, annul or avoid the right or title to the office, but merely renders it voidable or defeasible. That if the officer files his bond strictly in time, his right and title to the office are indefeasible. If he files it afterward, and it be accepted and approved, his right and title thereupon become equally indefeasible.

This latter seems a reasonable construction, and is one which we are disposed to adopt. Gage derived his title to the office from the election. The law does not favor forfeitures, and "in enforcing forfeitures courts should never search for that construction of language which must produce a forfeiture, when it will bear another reasonable construction." *Hartford Ins. Co. v. Walsh*, 54 Ill. 168; s. c., 5 Am. Rep. 115.

Supposing the filing of the bond within the fifteen days had been prevented by some inevitable accident, but the very next day after the officer filed his bond, which was accepted and approved,—in reason, why should not that suffice, and the officer have right to the office for the term for which he was elected? The aim of the statute would be fulfilled. The object of the statute was not a change of person to hold the office, but to secure an official bond. That having been given, the person whom the people had elected would seem the more proper person to have the office, than one appointed by the mayor and council.

It is conceded that after the expiration of the fifteen days the mayor and council would have been fully justified in refusing to accept and approve this bond, because of this default; and in appointing Gage's successor, as in the case of *Ross v. People*, 78 Ill. 375. Had they so elected, Gage's right to the office would have been forfeited, and a person appointed who would give a bond. But (in theory at least) the rights and interests of the public were made equally secure by electing to waive the right of forfeiture and accepting and approving the bond in suit, after the fifteen days.

"There is a known distinction," says Lord MANSFIELD, "between circumstances which are of the essence of a thing required to be done by an act of Parliament, and clauses merely directory. The precise time, in many cases, is not of the essence." *Rex v. Loxdale*, 1 Burr. 447. It seems reasonable that it is only when "the rights of the public, or of third persons depend upon the exercise of the power or the performance of the duty to which it refers," that the statute should be held mandatory, and otherwise but directory. *Kane v. Footh*, 70 Ill. 590; and see Sedgw. Stat. and Const. Law, 368-74. Here, the essence of the thing to be done,—that upon which the rights of the public depend,—is the giving of the bond, not the precise time when it is done.

There are numerous authorities that a provision of law, that an officer shall give bond within a prescribed time after his election, is directory only. *People v. Holley*, 12 Wend. 481; *State v. Churchill*, 41 Mo. 41; *State v. Porter*, 7 Ind. 204; and see *Kearney v. Andrews*, 2 Stock. Ch. 70; *Speake v. United States*, 9 Cr. 28. The other clauses in the charter, "he shall be deemed to have refused said office and the same shall be filled by appointment," or (if held to apply here) "the office shall become vacant," it may be held do not change the rule, as the following authorities show, in the case of words even more explicit than these.

In *State v. Toomer*, 7 Rich. (Law) 216, the statute required the master in chancery, within three weeks after his election, to tender his bond for approval, and upon its approval, to deposit it with the treasurer and sue out his commission, and that "upon his neglect or failure to do so within the said time, his office shall be deemed absolutely vacant, and shall be filled by election or appointment, as heretofore provided."

But the court held that the failure to comply with this requirement was only cause of forfeiture, but not a forfeiture *ipso facto*. That by a strict compliance with the directions of the statute, the title of the office was protected against forfeiture, "and that if the State sees proper to excuse his delinquency by granting him his commission, the defects of his title are cured, and it is converted into a title *de jure*, having relation back to the time of his election."

In *Sprowl v. Lawrence*, 33 Ala. 674, the statute required the sheriff to file his official bond in the office of the probate judge, before entering upon the duties of his office, and within fifteen days

after his election. The statute also expressly declared that if he failed to file his bond within the time prescribed by law, he vacated his office. The court there say: "By virtue of his election, Duncan was sheriff, so far as his mere right to the office was concerned, before he executed his bond. * * * The election having thus invested him with his title to the office, the statute requiring him to file his bond within fifteen days, and providing that on his failure to do so he "vacates his office," operates as a defeasance, and not as a condition precedent," and concluding as follows: "Our conclusion is, that the failure of a legally elected sheriff to file his bond within the time prescribed, does not, by its unaided force, operate his instantaneous removal from office; and that a bond executed by him more than fifteen days after his election, and before any steps or proceeding on the part of the State to affect his motion, must be considered as the bond of an 'officer,' within the meaning of section 132 of the Code," that is, of an officer *de jure*.

It is suggested by appellees' counsel, that this last case has been overruled by that of *State ex rel. v. Tucker*, 54 Ala. 205. But upon examination, we understand this to be so only in part, that is, in so far only as the former case seemed to require a judicial ascertainment of the vacancy before the appointment of a successor could be made.

Appellees lay stress upon these particular words in the condition of the bond, "or until said office shall be otherwise legally vacated." As the bond was signed by the sureties before the expiration of the fifteen days, it is contended that these words have reference to this very contingency of not filing the bond within fifteen days, and that by such express words of limitation, the sureties were not to be liable upon the bond if it was not filed within the fifteen days. We do not think it can fairly be said that in the use of these words the sureties intended to express the idea that they would not be liable upon the bond if it was not filed within the fifteen days; or that any special significance is to be attached to the use of the words.

The condition, in describing the office to which Gage had been elected, proceeds to speak of the length of the term of office, using the words, "to hold said office for the period of two years, and until his successor shall be duly elected and qualified or until said office shall be otherwise legally vacated" — but reciting what was the legal duration of the office. We think that these words referred

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to something to take place after the delivery and acceptance of the bond. That the meaning of the bond was that the sureties guaranteed that during the entire term which was fixed by law, Gage would continue faithfully to discharge the duties of the office to which he had been elected, unless after execution and delivery of the bond, such office should be legally vacated.

On November 20, 1871, the canvass of the votes was made and the common council declared Gage elected, and on the 27th of the same month he took and filed his oath of office. Although he had taken steps toward procuring his proposed bond, and had obtained the names of those who were willing to become his sureties, he failed to perfect it and to file it with the city clerk within the fifteen days, but neither the mayor nor the council either declared the office vacant, or appointed his successor; and when afterward he did present his perfected bond, they accepted and approved it. Upon the faith of the security of this bond he held and enjoyed the office for the full term of two years, and was intrusted with the public moneys. The apparent implied authority with which the sureties had clothed Gage to make use of and deliver this bond as his official bond, by signing and sealing the same and leaving it with him, was a continuing authority, until some step was taken by the sureties toward its revocation. Not a step was taken in that direction.

We do not think the sureties have the right now to set up in defeat of the bond that it was not accepted and approved and filed with the city clerk within the fifteen days prescribed in the charter.

Another question arises upon the ruling of the Circuit Court in excluding questions put to Gage when on the stand as a witness, as to whether certain balances were in his hands, as treasurer, at specified dates. He was asked whether the balance of \$519,508.07, which appeared charged against the city treasurer on December 4, 1871, the day of the commencement of his second term, was at that time actually in his hands. The same question was put with reference to December 11, 1871, and January 11, 1872. He was also asked whether or not the balance appearing to be in his hands December 16, 1873, of \$507,703.58, was at that time actually loaned out for the benefit of the city of Chicago. The questions were all excluded and exceptions taken.

Gage was his own successor in office. It was his duty as incoming treasurer to receive the treasury balance from his predecessor.

If he entered it in his treasury books after the beginning of his second term as having actually come to his hands from his predecessor, and continued afterward from time to time to return and report the same in his hands, both he and his sureties, we think, should now be concluded from denying that this balance did actually come into Gage's hands as treasurer. The law transferred any balance on hand to his second term.

The treasurer's monthly accounts or statements were in evidence, embracing the month of April, 1872, and continuing to the month of November, 1873, inclusive. These were each sworn statements, and they each commence with a statement of "balance in treasury" at the close of the next preceding month, and end with a statement of the "balance in treasury" at the close of the month covered by the account or return.

Gage's annual reports for the fiscal years ending March 31, 1872 and 1873, were also in evidence. He states in them he "submits here his annual report, with all receipts and expenditures during the fiscal years ending March 31, 1872 and 1873, respectively, and the amount in the treasury" at these respective dates. The entries in Gage's official books, in evidence, showing the same as the above, were all official entries, expressly enjoined by statute, the charter directing the city treasurer to keep books and accounts.

The same is true of the treasurer's monthly accounts and statements to the comptroller, and of his annual reports to the common council. He shall render a monthly statement or account to the comptroller, "showing the state of the treasury at the date of such account, and the balance of money in the treasury." He shall annually report to the common council "a full and detailed account of all receipts and expenditures during the preceding fiscal year, and the state of the treasury." These are the positive requirements of statute. The comptroller is chief of the treasury department, which has control of the fiscal concerns of the corporation. By the charter these books and accounts are to be always subject to the inspection of the comptroller and the finance committee of the common council; to the comptroller as chief the treasurer must make a monthly settlement of his treasury balance, based upon a stated account under oath, showing such balance, accompanied with warrants paid, and all other vouchers held by him, and which shall be delivered over to the comptroller and filed with his said account in the comptroller's office upon every day of such settlement. The

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charter required the treasurer to verify both his monthly accounts and annual reports by his oath, in writing, declaring that such statement, so far as he knows or has reason to believe, is a fair, accurate and full statement of the matters to which it relates, and of all moneys in his hands, etc.

In the discharge of the various duties which are required to be performed by the comptroller in relation to the financial affairs of the city, he necessarily acts upon the treasurer's books and monthly statements or accounts, together with the vouchers returned therewith, and the annual reports. He has no other data upon which to proceed, and he has a right to rely upon these.

Upon them and the doings of the comptroller based thereon the common council and the public at large implicitly rely as at all times affording a correct exhibit of the true treasury balance, which, in contemplation of law, is in the hands of the treasurer. They are the foundation upon which the fiscal concerns and financial policy of the municipal government are based.

These are the official books, statements, accounts and reports, kept and made as thus required, by and upon which appear and are shown the treasury balances which it is sought to falsify.

These balances were brought forward from Gage's first term, and stated and repeatedly restated in his said reports and monthly accounts made and rendered during his second term as being actually in his hands, down to the time when he was required to turn over the treasury balance to his successor in office. His official books carried forward to the close of his second term on the basis of the treasury balances, which, from month to month and from year to year during this term, he stated to the comptroller and common council, show the balance claimed in this suit to have been in his hands at the time he was required to pay over to his successor in office.

The correct keeping and making of such books, accounts, etc., was one of the duties of the office expressly enjoined by law, and which the sureties undertook the treasurer should perform, one of the conditions of the bond being that Gage "shall well and faithfully perform the duties of said office as prescribed and required by law."

The treasury balances appearing were shown and exhibited in and about the actual performance of an express duty of the office. They were of the *res gestæ* themselves.

To allow now Gage or his sureties, in avoidance of the liability on their bond for these treasury balances, to falsify them, and show that these balances, so stated and reported as being in the treasury, were not at the time actually in the treasury, would be inadmissible, as we conceive, upon sound legal principle.

As respects Gage himself, it would seem to be quite clear that these statements of his of the treasury balances in his hands should be conclusive upon him.

It is a familiar principle that a public officer making a return of his doings upon a writ shall not be allowed to gainsay the truth of it. *Barrett v. Copeland*, 18 Vt. 67; *Haynes v. Small*, 22 Me. 14; *Sheldon v. Payne*, 3 Seld. 453.

The principle upon this subject is laid down in *Cave v. Mills*, 7 Hurl. & Norm. 913. That was a suit by a surveyor to the trustees of certain turnpike roads against the trustees to recover certain sums expended by him in the improvement of the roads. He had rendered to the trustees accounts of his receipts and expenditures for the years 1856, 1857, 1858, showing certain balances due to himself. The suit was for sums knowingly omitted in the accounts for those years, and it was held that the plaintiff was estopped from recovering them. One principle of law invoked by the defendants was, that the plaintiff having made a statement false of his own knowledge, upon which the defendants had acted, was bound by such statement WILDE, B., who delivered the opinion of the court, after discussing this and another proposition, continues as follows: "We are of opinion that both these principles apply to the present case. Indeed they are but variations of one and the same broad principle, that a man shall not be allowed to blow hot and cold — to affirm at one time and deny at another — making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion. Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel,' or by any other name, it is one which courts of law have in modern times most usefully adopted."

And we are of opinion that the sureties should be equally concluded here with Gage himself.

Commissioners v. Mayrant, 2 Brevard, 228, was a suit on a sheriff's official bond. During his term of office the sheriff wrongfully indorsed a levy of a sum of money upon an execution in his

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hands and returned the execution with the levy thereon, and failed to pay over the money. The sureties on the bond were held to be responsible for the amount returned as levied by the sheriff, although the same was not in fact levied. It was said the sheriff's return was an official act which bound him officially and made his sureties liable.

In *McCabe v. Raney*, 32 Ind. 309, a suit against principal and sureties, joint makers of a promissory note, the principal having by his statements to the purchaser of the note that there was no defense to it, precluded himself from setting up a defense to the note, his sureties were held also precluded, the court saying: "Any act of the principal which estops him from setting up a defense, personal to himself, operates equally against his sureties."

In *Slovall v. Banks*, 10 Wall. 583, the Supreme Court of the United States, in holding that sureties in an administration bond are bound by a decree against their administrator finding assets in his hands to the same extent to which the administrator himself is bound, say: "Certainly the administrator was concluded. And the sureties in the bond are bound to the full extent to which their principal is bound. * * * There may be special defenses for a surety arising out of circumstances not existing in this case, but in their absence, whatever concludes his principal as an obligor concludes him."

In *Baker v. Preston*, 1 Gilmer (Va.), 235, an action upon a State treasurer's official bond, it was decided that the books kept by the treasurer were conclusive evidence of the balance actually in the treasury at any given time, both against the treasurer and his sureties, without being pleaded as an estoppel, so as to charge them with balances carried forward from year to year if those balances were actually on hand.

In *United States v. Girault*, 11 How. 27, a suit on the official bond of a receiver of public moneys, the breach assigned was, that on the 2d day of June, 1840, Girault, as such receiver, had received a large amount of public money, to wit: the sum of \$8,952.37, which he had refused to pay to the United States.

To this breach the sureties pleaded: That on the 2d of June, 1840, and on divers days before that day, the said Girault gave receipts as receiver for moneys paid on the entry of certain lands therein specified, and returned the same to the treasury department to the amount of \$10,000, and of which the amount in the declara-

tion mentioned was part and parcel. And that neither the \$10,000, nor any part thereof, was paid to or received by him, the said Girault.

The plea was held bad on general demurrer. The court say: "The condition of the bond is, that Girault shall faithfully execute and discharge the duties of his office as a receiver of the public moneys. The defendants have bound themselves for the fulfillment of these duties; and are of course responsible for the very fraud committed upon the government by that officer, which is sought to be set up here in bar of the action on the bond.

"As Girault would not be allowed to set up his own fraud for the purpose of disproving the evidence of his indebtedness, we do not see but that, upon the same principle, they should be estopped from setting it up as committed by one for whose fidelity they have become responsible. And see *Morley v. Town of Metamora*, 78 Ill. 394; s. c., 20 Am. Rep. 266; *Evans v. Keeland*, 9 Ala. 42.

The official books, monthly statements or accounts and annual reports kept, made and rendered by Gage, during his second term, abundantly show a liability to the amount of the recovery in this case; and holding them to be of the conclusive character which we do, against both Gage and his sureties, it is needless to consider whether the books of Gage for the first term, showing a balance in his hands at the close of his first term, were properly received in evidence, or whether proof that the balance thus appearing was not at that time actually in Gage's hands, was improperly excluded. If there was error in such respects, it would be a harmless one, as such proof of any balance at that time was entirely superfluous and unimportant, in view of the other plenary evidence which there is in the case of the amount of the defendant's liability.

The question as to the balance shown by the record in Gage's hands December 16, 1873, being loaned out for the benefit of the city, is liable to the further objection that its tendency, if answered affirmatively, would be to prove a breach of the bond in that respect. Under the charter the treasurer was required "to keep safely without loaning or using" the city money, and was permitted to deposit it at interest only by the authority of the common council manifested by ordinance or resolution, and in the manner prescribed by the charter. There is no pretense that such authority was ever given; on the contrary, there is evidence tending to show it was not given.

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We find no material error in the ruling of the Circuit Court upon the admission or exclusion of evidence.

The judgment of the Appellate Court is reversed and the cause remanded, with directions to enter a judgment of affirmance of the judgment of the Circuit Court.

Judgment reversed.

DICKEY, J., took no part in the decision.

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CASES
IN THE
SUPREME COURT.
OF
INDIANA.

BRUKER V. TOWN OF COVINGTON.

(69 Ind. 33.)

Negligence — contributory — defect in sidewalk.

One who attempts in the dark to pass an open cellar-way in a sidewalk, knowing, but for the time forgetting its existence, is guilty of such contributory negligence as will defeat his recovery for injuries sustained by falling into it.*

ACTION of negligence for personal injury. The opinion states the facts. The defendant had judgment below.

W. A. Tipton, S. E. Wood, L. Nebeker and S. M. Camborn, for appellant.

H. H. Dochterman and T. L. Stillwell, for appellee.

NIBLACK, J. The complaint in this case charged that prior to the 7th day of March, 1877, a deep and dangerous cellar-way or hole had been excavated in the sidewalk on the north side of Lib-

* See *King v. Thompson* (87 Penn. St. 365), 30 Am. Rep. 364. Compare *Evans v. City of Utica* (69 N. Y. 66), 25 Am. Rep. 165.

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erty street, a public street within the limits, and under the jurisdiction and control of the defendant, the town of Covington ; that for a long time previous to and up to and including that time, such cellar-way or hole had been permitted to remain open and exposed, and without protection or notice to travellers along and upon said street, of all which the defendant had notice; that on the night of the said 7th day of March, 1877, the plaintiff, John Bruker, was lawfully walking along and upon said sidewalk, unaware of danger, and without any fault or negligence on his part was accidentally precipitated into said cellar-way or hole, whereby he was greatly injured, and his right wrist had become stiffened and permanently disabled.

The defendant answered in general denial. A trial by a jury; verdict for the defendant; motion for a new trial; and judgment on the verdict.

On the trial there was evidence tending to show that the excavation complained of was an old cellar-way to a building near by, and ran parallel with the sidewalk; that there was a stone wall about eighteen inches high between the cellar-way and the sidewalk, except at the east end of the cellar-way, where there had been some steps; that the place where the steps had been was filled up with cinders and ashes even with the sidewalk.

The plaintiff, among other things, testified that he had resided in the town of Covington since the 4th day of July preceding his injury; that he had seen the cellar way once or twice; that he had passed along the sidewalk adjoining it two or three times without observing it very closely; that he had passed along the opposite side of the street quite frequently; that he had gone on the opposite side because he regarded the sidewalk passing the cellar way as a bad sidewalk; that at the time of the accident he did not have the cellar way in his mind; that the night on which the accident occurred was very dark.

Other witnesses testified to having frequently seen the plaintiff on the street near the cellar way.

The court instructed the jury as follows:

"1st. If the plaintiff knew the opening or cellar way was in the sidewalk, and he attempted to pass the place where it was, when, in consequence of the darkness of the night, he could not see it, he has no legal reason to complain of the injury he received on account of the fact that the opening or cellar way was there. In such cases

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he must be treated as having taken the risk upon himself, and this too although at the time the fact of the existence of the opening was not present to the plaintiff's mind.

"2. If the cellar way was an open one, and the plaintiff knew its location, and that it was an open one in the sidewalk, he must be held to know that there was danger of falling in it when passing the place in a dark night, and he cannot recover, if, with knowledge of the existence of the opening described in the complaint, he attempted to pass it in a dark night, and in such attempt was injured by falling into it."

The giving of these instructions was assigned as one of the causes for a new trial, and the objections urged to them by the appellant constitute the only questions discussed by him in his argument in this court.

The appellant objects to the instructions complained of because,

First. He insists that his failure to remember the existence of the cellar way did not amount to contributory negligence;

Second. To make a disregard of his previous knowledge contributory negligence, it was necessary to show that he had also knowledge of the dangerous condition of the cellar way;

Third. The obstruction being only a partial one, the doctrine of the instructions does not apply, because it takes the question of negligence from the jury. A distinction exists between a total obstruction and only a partial one. In case of total obstruction, the court is allowed to pronounce upon the question of negligence, whereas, when a partial obstruction only is shown, the question of negligence is to be determined by the jury.

In the case of *President, etc., of Mt. Vernon v. Desouchett*, 2 Ind. 586, it was in substance decided, that if a person knows there is an obstruction in a street, and he attempts to pass the place, when, in consequence of the darkness of the night, or other hindering cause, he cannot see the obstruction and runs upon it, he has no reason to complain of the injury he may sustain. In such a case he takes the risk on himself. In other words, that a disregard of the knowledge of the existence of such an obstruction, by which an injury results, amounts to contributory negligence.

That case has been approved in principle and followed by this court in numerous cases, and the rule recognized by it as to contributory negligence may be regarded as the settled law of this State, *Toledo, etc., Ry. Co. v. Goddard*, 25 Ind. 185; *Riest v. City of*

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Goshen, 42 id. 339 ; *Jonesboro, etc., Turnpike Co. v. Baldwin*, 57 id. 86 ; *City of Indianapolis v. Gaston*, 58 id. 224 ; *Pennsylvania Co. v. Sinclair*, 62 id. 301 ; s. c., 30 Am. Rep. 185. See, also, *Moore v. Inhabitants of Abbott*, 32 Me. 46 ; *Alger v. City of Lowell*, 3 Allen, 402 ; *Wilson v. City of Charlestown*, 8 id. 137 ; *Gilman v. Inhabitants of Deerfield*, 15 Gray, 577 ; Dill. on Mun. Corp., § 789.

To sustain the defense in this case, it was sufficient to show that the plaintiff had knowledge of the obstruction. Having such knowledge, it was for the plaintiff to judge for himself as to the dangerous character of the obstruction, and take the risk accordingly if he ran upon it.

We are not aware of any such distinction between a total obstruction and a partial one only, as insisted upon by the appellant. No authority has been cited recognizing any such distinction, and we know of no such authority. We think that the instructions complained of are well sustained by the authorities cited above in this opinion, and other analogous cases which need not be here referred to.

The judgment is affirmed, with costs.

Judgment affirmed.

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(69 Ind. 61.)

Sunday — pursuing avocation on — selling cigars at hotel.

An innkeeper sold cigars on Sunday from a stand which was a part of his establishment. Held that he was not punishable under the statute for engaging in common labor and his usual avocation.*

CONVICTION of desecrating Sunday. The opinion states the facts.

J. S. Scobey, for appellant.

T. W. Woollen, attorney-general, and *J. L. Bracken*, prosecuting attorney, for the State.

* See *State v. Lorry* (7 Baxt. 95), 22 Am. Rep. 555, and note, 557.

BIDDLE, J. The appellant was indicted under the act providing penalties for the desecration of the Sabbath. The charge in the indictment is alleged in the following words:

"That on the 16th day of November, 1879, which was the first day of the week, commonly called Sunday, Sidney A. Carver, who was then and there a person over the age of fourteen years, at and in the county of Decatur and State of Indiana, did then and there unlawfully engage in common labor and his usual avocation, in this, to wit, that he did then and there unlawfully sell and deliver to one Harvey D. Stagg two cigars, and receive from him the sum of ten cents in payment for the same, the said act of common labor not being," etc. The indictment then properly avers the negatives in the section upon which it is founded.

Trial; conviction; judgment; appeal.

The indictment is based upon the following section of the act of February 28, 1855, 2 R. S. 1876, p. 483.

"SECTION 1. *Be it enacted,*" etc., "That if any person of the age of fourteen years and upwards, shall be found, on the first day of the week commonly called Sunday, rioting, hunting, fishing, quarrelling, at common labor, or engaged in their usual avocations, works of charity and necessity only excepted, such person shall be fined in any sum not less than one nor more than ten dollars; but nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as the Sabbath, travellers, families removing, keepers of toll-bridges and toll-gates, and ferry-men, acting as such."

Two questions are presented by the record :

1. The sufficiency of the indictment under the statute;
2. The sufficiency of the evidence to support the conviction.

We will consider these questions in their order.

1. No objection to the indictment has been shown to us, and we see none; we must therefore hold it to be good.
2. Does the evidence support the conviction?

The evidence shows substantially the following facts: That the defendant was a clerk and book-keeper in a hotel; that the hotel kept a cigar stand within three to five feet from the desk of the book-keeper; that another person, an employee of the hotel, usually attended to the cigar stand, which was kept for the accommodation of the hotel, and was a part of the establishment, but that the defendant, in the absence of the person who usually attended to

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the cigar stand, occasionally sold cigars to the guests and boarders of the hotel, and sometimes to the customers and visitors of the hotel; that on this occasion, in the absence of the person who attended to the cigar stand, the defendant made the sale on Sunday, charged in the indictment.

Do these facts constitute the misdemeanor charged in the indictment, within the fair meaning of the law?

The condition of a country, the form of its government, the history of its inhabitants, their pursuits, general intelligence, modes of life, manners and habits, enter into the construction of the laws made to govern them; and laws are not made so much for their abstract perfection as for their adaptability to the people they govern. We must also look to the period of the world at which they were enacted to get at their meaning, that meaning being the true intent and purpose of the legislative power that enacted them. What, then, did the legislature mean by the use of the words "works * * * of necessity," in the law under consideration? The word "necessity" means 1, irresistible force; 2, inevitable consequence. But these are not its true meanings when used in a law touching the voluntary conduct of men. It means, 3, being necessary; 4, something that is necessary. We say "The necessities of our nature; the necessities of life. Habit and desire create necessities; but nature requires only necessities." Sometimes the word "necessity" means no more than "occasion," or that which gives rise to something else. Worcester. We are not to seek the physical, metaphysical, philosophical, scientific, moral or theological meaning of the word "necessity;" but its legal meaning, as applicable to the rights, duties and conduct of men. Sailing ships, running steamboats and railroad trains, carrying the mails, operating telegraph lines, keeping up water-works and gas-works, carrying on distilleries, breweries, and running flouring-mills, are not prohibited on Sunday, we believe, anywhere in the civilized world, and seldom regulated any differently on Sunday from a week day; and large manufactories, blast-furnaces, salt-works, oil wells, and other pursuits wherein heavy machinery is used, and where a stoppage is attended with loss or inconvenience, are seldom interfered with in their operations on Sunday by legal restriction.

The earliest regulation we find touching Sunday, as a civil institution, was an edict of Constantine, A. D. 321, which declared that "on the venerable day of the Sun, let the magistrates and

people residing in cities rest, and let all workshops be closed. In the country, however, persons engaged in the work of cultivation may freely and lawfully continue their pursuits, because it often happens that another day is not so suitable for grain-sowing or for vine-planting, lest by neglecting the proper moment for such operation the bounty of Heaven should be lost." This edict was modified by various provisions of the civil law, A. D. 326, 368 and 386. In the year 469 all legal proceedings were prohibited on Sunday. These regulations were adopted by the several rulers of the Heptarchy, continued after their union under Egbert, and subsequently confirmed by William the Conqueror, as a part of the common law. *Swann v. Broome*, 3 Burr. 1595.

By an act of Parliament, A. D. 1552, 5 and 6 Edward VI, ch. 3, it was declared that nothing in the Scriptures prescribed any certain day upon which Christians should refrain from labor, and enacted that Sunday and certain other days should be observed as holidays provided that when necessity might require, it should be lawful "to labor, ride, fish, or work any kind of work." The king further ordered "that the lords of the council should upon Sundays attend to the public affairs of his realm, dispatch answers to letters for the good order of the State, and make full dispatches of all things concluded the week before." James I, in his Book of Sports, declared that "our pleasure is after the end of divine service our good people be not disturbed, letted or discouraged from any lawful recreation." This regulation was confirmed by Charles I. By the statute 29 Charles II, ch. 7, it was enacted that "no tradesman, artificer, workman, laborer, or other person whatever, shall do or exercise any worldly labor, business or work of their ordinary callings upon the Lord's Day, or any part thereof, works of necessity and charity only excepted." This statute, we believe, remains substantially the law of England to the present day, with a tendency, however, to relax the stringency of former decisions. By this statute the sale of meat in public houses, and milk at certain hours, on Sunday, is not prohibited. 4 Bl. Com. 63.

In the United States, where religion can be neither opposed nor supported by law, and where Sunday, under the law, is viewed purely in a secular light, the tendency naturally is to relax the restrictions of the Sunday law in all things which do not interfere with the rights of others, and do not annoy or discomfort the public generally. The present statute of this State, we believe, is sub-

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stantially in harmony with the Sunday laws in the several States of the Union. Throughout the civil law from Constantine, or the common law and statutes of England from William the Conqueror, and the statutes of the several States of the Union, we have found no case which holds the performance of ordinary domestic services in a household on Sunday, or the performance on Sunday of the ordinary services necessary to carry on, in the usual manner, a hospital, almshouse, hotel or other public institution of the kind, to be within the statutory laws prohibiting labor on Sunday. All such services are uniformly held to be exceptions under the law. *Rex v. Cox*, 2 Burr. 785; *Rex v. Younger*, 5 T. R. 449; *Commonwealth v. Nesbit*, 34 Penn. St. 398; *Flagg v. Inhabitants of Millberry*, 4 Cush. 243; *Bennett v. Brooks*, 9 Allen, 118; *Commonwealth v. Knox*, 6 Mass. 76; *Commonwealth v. Sampson*, 97 id. 407; *Doyle v. Lynn and Boston R. R. Co.*, 118 id. 195; s. c., 19 Am. Rep. 431; *Crosman v. City of Lynn*, 121 Mass. 301.

There is a difference between a work which may be done on one day as well as another, and which is not a daily need, and a work necessary to supply a constant daily want. There is no necessity for working in a shop, ploughing a field, selling from a store, opening an office, going to the exchange or mart of commerce, or working at any common labor or usual avocation, on Sunday; but there is a daily necessity for putting a house in order, cooking food, taking meals, drinking coffee or tea, smoking a cigar by those who have acquired the habit, or continuing any other lawful habit, on Sunday, the same as there is upon a week day; and whatsoever is necessary and proper to do on Sunday to supply this constant daily need is a work of necessity within the fair meaning of the law under consideration.

In this State it has been held that manufacturing malt beer, gathering and boiling sugar-water to prevent its waste, receiving the verdict of a jury by a court, and gathering the fruits of the earth to prevent their decay and taking them to the market-place on Sunday, are works of necessity, within the meaning of the present act. *Crocket v. State*, 33 Ind. 416; *Morris v. State*, 31 id. 189; *Jones v. Johnson*, 61 id. 257; *Wilkinson v. State*, 59 id. 416; s. c., 26 Am. Rep. 84. In the last case, the true rule, we think, was laid down by Howk, J., namely, that labor performed on Sunday, which is necessary, under any particular state of circumstances, for the accomplishment of a lawful purpose, is not a violation of the

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Sunday law. See, also, *Edgerton v. State*, 67 Ind. 588 ; s. c., 33 Am. Rep. 110, and *Turner v. State*, 67 Ind. 559.

Keeping a hotel in this State on Sunday is not unlawful. Keeping a hotel on Sunday, in the same way that it is usually kept on a week day, is not unlawful. It follows, then, that if a hotel keeps a cigar stand, which is a part of its establishment, from which it sells cigars to its guests, boarders and customers, on a week day, to sell cigars from the same stand in the same way on Sunday, is not unlawful. Indeed, we see no difference, legally, between the act of selling a cigar under such circumstances, and the act of furnishing a cup of tea or coffee, a meal of victuals, or supplying any other daily want, to a customer on Sunday for pay.

In this view of the case, it is clear that the evidence does not support the conviction.

The judgment is reversed, and the cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

Reversed and remanded.

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(69 Ind. 36.)

Criminal law—riot—charivari.

Under a statute making violent and tumultuous conduct by three or more persons a riot, persons conducting a *charivari*, or serenade with bells, horns, tin pans, guns, etc., are guilty of a riot.

INDICTMENT for riot. The opinion states the case. The indictment was quashed at the trial.

T. W. Woollen, attorney-general, and *C. W. Watkins*, prosecuting attorney, for the State.

A. Steele, *R. T. St. John*, *I. Van Devanter* and *J. W. Lacey*, for appellees.

Howk, C. J. In this case the indictment charged that on the 30th day of October, 1879, in Grant county, Indiana, the appellees,

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John H. Brown, David Line and James Snyder, and four other named defendants, "together with other persons whose names are to the grand jurors unknown, did then and there unlawfully, riotously and in a violent and tumultuous manner, assemble and gather themselves together, with force and arms, to wit, clubs, bells, trumpets, tin pans and cannon, and other weapons, and then and there unlawfully and riotously, and in a violent and tumultuous manner, made a great noise, tumult and disturbance, and then and there continued the same for half an hour or more."

The three appellees above named, Brown, Line and Snyder, moved the court to quash the indictment, which motion was sustained, and to this decision the State, by its attorney, excepted. The court rendered judgment discharging the appellees, and from this judgment the State, by its attorney, prosecutes this appeal.

The decision of the court in sustaining the appellees' motion to quash the indictment is assigned as error by the State, and this error presents for the decision of this court the single question: Do the facts stated in the indictment in this case constitute a public offense? If they do the court erred in sustaining the motion to quash the indictment; and if they do not constitute a public offense, then it is clear that the indictment was correctly quashed. It is manifest, from the language used in the indictment, the substance of which we have given, that it was intended to charge the appellees and the other named defendants, therein and thereby, with the commission of the misdemeanor which is defined, and its punishment prescribed, in section 4 of the misdemeanor act of June 14, 1852. That section provides that, "If three or more persons shall do an act in a violent and tumultuous manner, they shall be deemed guilty of a riot, and upon conviction thereof, shall be fined not exceeding five hundred dollars each, to which may be added imprisonment in the county jail for any time not exceeding three months." 2 R. S. 1876, p. 458.

The appellees have not seen proper to furnish this court with any brief or argument in support of the decision of the Circuit Court, and we confess that we are unable to discern upon what grounds the court held that the indictment was insufficient and must be quashed. From the character of the instruments, musical and otherwise, mentioned in the indictment, we may reasonably conclude, we think, without injustice to the appellees and their codefendants, that, at the time and place named, they were probably

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engaged in giving a "newly-wedded pair" that kind of a concert or serenade which is usually called a *charivari*. Such a concert is usually much more entertaining to the performers than it is to the audience, and when it is engaged in by three or more performers, with zeal and earnestness, it may often be denominated as a riot, and the performers therein may be subjected to the punishment prescribed for such offense. *Bankus v. State*, 4 Ind. 114; *State v. Voshall*, 4 id. 589; *Thayer v. State*, 11 id. 287; *Kiphart v. State*, 42 id. 273.

In our opinion, the indictment in the case at bar did state facts sufficient to constitute a public offense, and therefore we think that the appellees' motion to quash it ought not to have been sustained.

The judgment is reversed, at the appellees' costs, and the cause is remanded with instructions to overrule their motion to quash the indictment. and for further proceedings.

Judgment reversed.

WRIGHT V. STATE.

(69 Ind. 163.)

Criminal law — trial — instruction — "common sense."

After instructing a jury, in a criminal case, that they are judges of the law as well as the facts, it is error to instruct them that "common sense" is their best guide, without limiting its application to the value and weight of evidence.

CONVICTION of grand larceny. The opinion states the case.

W. C. Glasgow, for appellant.

T. W. Woollen, attorney-general, and *I. S. Drake*, prosecuting attorney, for the State.

NIBLACK, J. At the February term, 1879, of the court below, the appellant, Walter L. Wright, was indicted and tried for, and convicted of, grand larceny.

On the trial the court gave to the jury an elaborate series of instructions in writing.

After telling the jury that they were the judges of the law as well as of the facts of the case, as also of the credibility of the witnesses, the weight of the evidence, and of the inferences proper to be drawn from facts proven, and that the defendant was presumed to be innocent until proven guilty, the court proceeded as follows:

"6. The presumption of innocence continues until the proof of guilt is made clear and conclusive, leaving no other inference and excluding all reasonable doubt. A reasonable doubt is one suggested by or arising out of the proofs made, and [which] after a full and fair consideration of all the evidence *pro* and *con*, remains in the mind, causing some degree of uncertainty as to the alleged guilt. If the evidence adduced against the accused can be explained on any consistent and reasonable hypothesis, there must be an acquittal.

"7. It is not meant to be said, however, that the proof of guilt must be certain to a mathematical demonstration. It need be only to a moral certainty. Such certainty as would warrant a prudent and cautious man in voluntary and unhesitating action in a matter of the highest concern to himself. It is not a reasonable doubt which may be raised by conjecturing something for which there is no foundation or suggestion in the evidence adduced.

"8. As already stated substantially, the reasonable doubt is one which is suggested by or springs out of the proof made, and [which] after giving due weight to all criminating circumstances and proofs, remains in the mind, suggesting a reasonable possibility of innocence. What is commonly called common sense is perhaps the juror's best guide in these particulars."

So much of the instructions above set out as limited a reasonable doubt to something which is suggested by, or arises from, or springs out of, the evidence adduced gave, what appears to us to have been a too narrow definition of that which is implied by a reasonable doubt. A reasonable doubt may arise from a want of evidence as to some fact having a natural connection with the cause. It has reference to that uncertain condition of the mind which may remain after considering what has not been proven as well as that which has.

So much of the last clause of instruction No. 8 as told the jury

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that "common sense is perhaps the juror's best guide" in the particulars referred to was, we think, also erroneous. Common sense is an important element in the administration of justice, and perhaps an indispensable element in its successful administration, but to tell the jury that it was their "best guide" after having informed them that they were the judges of the law as well as the facts, was very nearly, if not quite, equivalent to saying to them that "common sense" was superior to law in determining the guilt or innocence of the defendant. If the court had expressly limited its commendation of common sense as a guide to so much of the case as had reference to the value and weight of the evidence only, we might not have seen any objection to that part of the instruction, but the phraseology used was, as it seems to us, susceptible of a much wider construction than that. See *Densmore v. State*, 67 Ind. 306; s. c., 33 Am. Rep. 96, where similar instructions were held erroneous.

On account of the errors above indicated, and for other alleged causes, the defendant moved the court for a new trial, and for the reasons given we are of the opinion that a new trial ought to have been granted.

[Omitting a minor matter.]

The judgment is reversed, and the cause remanded for a new trial.

The clerk will give the proper notice for the return of the prisoner.

Judgment reversed.

FLETCHER V. PIERSON.

(69 Ind. 281.)

Negotiable instrument — check — notice of dishonor — withdrawal of funds.

Notice of dishonor to the drawer of a check is unnecessary if he had no funds with the drawee at the time of drawing, or withdrew them afterward before presentment, although the presentment was not prompt.*

ACTION on check. The opinion states the facts. The defendant had judgment below.

* See *Kinyon v. Stanton* (44 Wis. 479), 28 Am. Rep. 601, and note. 602.

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N. B. Taylor, F. Rand, E. Taylor, H. M. Talbott and W. O. Wheeler, for appellants.

J. V. Hadley and — *Parker*, for appellee.

SCOTT, J. Complaint as follows: [Omitting it.] There was a demurrer to each of the paragraphs of the complaint for the want of facts. The demurrer was sustained, exception reserved by the plaintiff, and final judgment rendered against the appellants for costs.

The error complained of is on the ruling of the court in sustaining the demurrer to the complaint.

The counsel for the appellee make the point that "There is no allegation that the appellee was ever notified of the dishonor of the check, and from the facts stated, as a conclusion of law, the appellee was discharged from liability by reason of the laches of the appellants in presenting the check for payment and giving notice of non-payment.

We are of the opinion that the point is not well taken. Under the allegation in the first paragraph of the complaint, the appellee drew his check on a bank to pay a debt; he had funds in the bank at the time, with which to pay the check; he withdrew the funds before the check was presented. Under this state of facts the appellee was not entitled to notice of the dishonor, for he could in no way be injured for want of notice of the dishonor of his check, when he had himself caused its dishonor by withdrawing his funds from the bank. The court erred in sustaining the demurrer to the first paragraph of the complaint.

The second paragraph alleged that the appellee had no funds in the bank when he drew the check. In such a case we think no notice of dishonor of the check was necessary.

The appellee insists that he is discharged for the reason that the check was not presented in a reasonable time. We are unable to see any force in this objection to the complaint. If one may draw a check on a bank and pay a debt, having no funds in the bank with which to pay the check, or having funds at the time, withdraw the funds before the check be presented for payment, and then avoid his liability for want of notice of the non-payment of the check when presented, or because the holder had not been prompt in presenting the same for payment, the law is inadequate to

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the enforcement of justice in such a case. Such a rule would lead to great wrong, and in many instances protect the dishonest. The court erred in sustaining the demurrer to the second paragraph of the complaint.

The judgment is reversed, at the costs of the appellee ; cause remanded, with instructions to overrule the demurrers to the first and second paragraphs of the complaint, and for further proceedings in accordance with this opinion.

Reversed and remanded.

DANENHOFFER V. STATE.

(69 Ind. 295.)

Schools — right of teacher to chastise pupil.

The teacher of a public school has the right moderately to chastise a pupil for refusing to render an excuse for absence from school without leave.

CONVICTION of assault and battery. The opinion states the case.

G. Durbin, for appellant.

T. W. Woollen, attorney-general, and *W. G. Holland*, prosecuting attorney, for the State.

Howe, C. J. This was a prosecution against the appellant Aloys Danenhoffer, for an assault and battery alleged to have been committed by him on one Henry Roell.

The prosecution was commenced before a justice of the peace of Ripley county, Indiana, upon the affidavit of one Henry Clark, wherein it was charged, in substance, that the appellant, on the 18th day of November, 1879, at said Ripley county, "did, in a rude, insolent and angry manner, unlawfully touch one Henry Roell, contrary," etc.

The appellant waived an arraignment and entered a plea of not guilty to the charge contained in said affidavit, before the justice; and the cause was there tried by a jury, resulting in a verdict find-

ing the appellant guilty as charged, and assessing his fine in the sum of thirteen dollars, upon which verdict judgment was rendered by the justice. From this judgment an appeal was duly taken to the Ripley Circuit Court, by the defendant below.

Upon this appeal the cause was again tried by a jury, in the Circuit Court, and a verdict was returned finding the appellant guilty as charged in said affidavit, and assessing his fine in the sum of ten dollars. His motion for a new trial having been overruled and his exception entered to this ruling, the court rendered judgment on the verdict.

In this court the only error assigned by the appellant is the decision of the Circuit Court in overruling his motion for a new trial. In this motion the following causes were assigned for such new trial :

1. The verdict was contrary to the evidence.
2. The verdict was contrary to law.
3. The court erred on the trial, in the admission of illegal evidence, in permitting Henry Roell and other witnesses to testify that the injured party and two other boys had been absent from school on Tuesday, the 11th day of November, 1879, attending the funeral of Clark's child, and had acted as pall-bearers at the funeral.
4. The court erred in refusing to permit the appellant to testify on the trial, in answer to a question propounded to him, whether he thought it was wrong for the children to have attended the funeral of a Protestant child, thereby excluding from the jury evidence of a material fact.
5. Error of the court in refusing to give the jury the instructions asked by the appellant; and,
6. Error of the court in giving the jury instructions numbered from 1 to 10, both inclusive, each and all of which were duly excepted to by the appellant.

Before considering any of the questions presented and discussed by the appellant's counsel, in his brief of this cause in this court, we deem it necessary that we should give a summary, at least, of the uncontradicted facts of the case, as we gather the same from the record. The appellant was a Catholic priest, residing at Morris, in Decatur county, Indiana, and at that place he had under his control a Catholic school, of which he was superintendent, and Sister Bernardini was a teacher. Among the pupils of this school

were Henry Roell, aged eleven years, Bernard Shuck, aged eleven years, and John Tekulve, aged eleven years. On the 11th day of November, 1879, these three boys were absent from the school, without the leave or permission of the teacher or of the superintendent of the school, and were in attendance as pall-bearers at the funeral of a child of the Henry Clark who filed the affidavit upon which the prosecution against the appellant in this case was predicated. In some manner, the child, Henry Roell, and his father, Henry Roell, Sr., and the child, Bernard Shuck, and his grandfather, B. H. Westrick, had, or claim to have, received information that the two boys were to be punished for their non-attendance at school on the day last named, by the appellant, as the superintendent of the school, not because they were absent from school without the leave of the teacher or superintendent entirely, but in part, at least, because they had absented themselves from school for the purpose of attending the funeral of the child of a Protestant. Acting upon this information, or possibly assumption, the said Henry Roell, Sr., and B. H. Westrick, on the 13th day of November, 1879, called upon the appellant and informed him that the boys had been absent from school, and had attended the funeral of the child, on the day previous, with their consent and permission; that they had been informed that the boys were to be whipped for attending the funeral, and they thought that they should be punished rather than the boys, on that account; and the appellant then said to them that the boys should not be punished for attending the funeral.

When the boys went to school on the 12th day of November, 1879, they were required by the teacher in charge, Sister Bernardini, to give an excuse for their absence from school without leave on the preceding day, but they would not give any excuse. She then gave the boys a note and directed them to take it to the appellant, at his house, about fifty steps from the school-house; but as soon as they were outside of the school-house, they ran home and never delivered the note to the appellant. On the next day, the 13th day of November, 1879, the appellant entered the school-room and whipped the boys, as he declared at the time, not for going to the funeral, but for their disobedience of the order of the teacher in charge, requiring them to take and deliver her note to the appellant. It was this whipping of the boy, Henry Roell, by the appellant, as the superintendent of the school, of which the boy was one of the pupils, which constituted the alleged assault and battery, for

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which the appellant was prosecuted and convicted in this case. There is no evidence in the record, as we read it, which tends to show that the boy, Henry Roell, was whipped by the appellant for any other cause or reason than his stubbornness in refusing to render to the teacher in charge an excuse for his absence from school without her leave, and his disobedience to her reasonable command, that he should take the note she gave him to the appellant, as the superintendent of the school. Nor do we think that the evidence tends to show that the boy was whipped by the appellant in anger or with much severity.

It seems to us that the evidence in this case was not sufficient to sustain the verdict of the jury, and that for this reason, a new trial ought to have been granted. The appellant was the superintendent of the school; he employed the teachers, and both teachers and pupils were under his charge. Sometimes he heard the scholars recite their lessons; and generally, when the pupils of the schools were disobedient, rude or stubborn, they were sent to him for correction. It is manifest, that the father of the boy, Henry Roell, well understood the appellant's relation to and superintendency of the school; for he went to see the appellant, and not Sister Bernardini, in regard to the whipping it was rumored that the boy was to receive for absenting himself from school without leave.

We think therefore that the fact is apparent from the record of this cause, that the appellant, with the knowledge of the father of the boy, Henry Roell, stood *in loco parentis* to the boy during his attendance at and in the school of which the appellant was the superintendent in charge. In such a case, the law is well settled, as it seems to us, that the teacher has the right to exact from his pupils obedience to his lawful and reasonable commands, and to punish disobedience with "kindness, prudence and propriety." *Cooper v. McJunkin*, 4 Ind. 290. In the recent case of *State v. Burton*, 45 Wis. 150; s. c., 30 Am. Rep. 706, it was well said: "In the school, as in the family, there exist on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law, and is subject to it, whether it has or has not been re-enacted by the district board in the form of written rules and regulations."

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It is unnecessary for us to pursue this question further, or to examine the other causes assigned by the appellant for a new trial. The boy, Henry Roell, was disobedient to the reasonable commands of the teacher in charge of the school, of which he was a pupil, and he was insubordinate, in that he ran home when he was sent out of the school for another purpose. He deserved punishment, and the appellant had the right, under the law, to administer it; and we do not think that the evidence shows that the boy was whipped by the appellant with that unreasonable severity which would or ought to subject him to punishment for an assault and battery.

The judgment is reversed, and the cause is remanded with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

Reversed and remanded.

BENSON V. ADAMS.

(66 Ind. 353.)

Negotiable instrument — action on — when may be commenced.

No action can be maintained on a negotiable promissory note until the lapse of the full third day of grace.*

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

D. V. Burns and C. S. Denny, for appellant.

C. F. Hunt, for appellees.

BIDDLE, J. Complaint by appellees, against the appellant, in two paragraphs, filed on the 26th day of January, 1877. No question arises upon the first paragraph; we do not therefore state it.

The second paragraph counts upon a promissory note, made by appellant to the appellees, for one hundred dollars, dated November 24th, 1876, payable sixty days after date at the office of the

* To same effect, *Estes v. Tower* (108 Mass. 65), 3 Am. Rep. 439.

"Indiana Banking Company," Indianapolis, with ten per cent interest after maturity, waiving presentment, protest and notice, etc.

The suit was commenced on the 26th day of January, 1877.

Demurrer for want of facts overruled. Answer by a third paragraph, as follows :

That said note was payable in a bank in the State of Indiana, and that, by its terms, and the law governing such notes, it was not payable until the sixty-third day after the date thereof, to wit, on the 26th day of January, 1877, and that this action was commenced on said 26th day of January, 1877, and before any demand of payment or protest of said note was made, and was therefore brought before said note became due and payable, etc.

A demurrer for the want of facts was sustained to this paragraph of answer.

There are other pleadings in the case, upon which issues of fact were joined and a trial had, resulting in a finding and judgment in favor of the appellees.

Overruling the demurrer to the complaint, and sustaining the demurrer to the answer, present the same legal question, namely :

1. Can an action be commenced on a promissory note governed by the law merchant, on the third day of grace ?

The same question is also presented by the evidence in the bill of exceptions ; it is, indeed, the sole question in the case.

A day is the unit of time. It commences at 12 o'clock P. M. and ends at 12 o'clock P. M., running from midnight to midnight. In the division of time throughout the world, we believe this is regarded as the civil day. When the word "day" is used in a statute or in a contract, it means the twenty-four hours, and not merely the day as popularly understood, from sunrise to sunset, or during the time the light of the sun is visible. The fractions of a day in statutes, or legal proceedings, or in contracts, are not generally considered ; but when the rights of parties depend upon the precedence of time in the same day, or upon a given hour or fraction of a day, it may be alleged or proved, as any other fact. 2 Bl. Com. 141 ; *Sadler v. Leigh*, 4 Campb. 195 ; *Thomas v. Desanges*, 2 B. & Ald. 586 ; *Brainard v. Bushnell*, 11 Conn. 16 ; *Hinton v. Locks*, 5 Hill, 437 ; Bouv. Dict., tit. Day. But unless the meaning of the word is in some way restricted, it will be held to include the twenty-four hours.

By section 787 of the Code, in all legal proceedings touching the administration of justice in courts, it is enacted that "The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last." It is also enacted, that

"On all bills of exchange, payable within this State, whether sight or time bills, three days' grace shall be allowed." Under these statutes it has been held that the day includes twenty-four hours. In computing the time on promissory notes negotiable and payable at a bank in this State, the day upon which the note is made is excluded, and the third day of grace included. *Fisher v. State Bank*, 7 Blackf. 610. This, we believe, is the uniform rule of computing time on a bill of exchange.

By the common law the maker of a promissory note has all the day on which it becomes due within which to pay it. Our statutes have made no change between an ordinary note and a promissory note negotiable and payable at a bank, except to put it upon the footing of a bill of exchange, and give it three days' grace. Such a note is due on the third day after it matures, according to the terms expressed on its face, the same as an ordinary promissory note, not negotiable and payable at a bank, is due on the day expressed on its face. We can see no intrinsic reason why a bill of exchange — and the note we are considering is an inland bill of exchange — should mature at an earlier hour, on the third day of grace, than an ordinary promissory note matures on the day it falls due, according to its terms. Our decisions uniformly hold that the word "day" in a statute, and when used in a contract, means the entire twenty-four hours; and that the obligor, when the contract is limited in time, has all of the last day within which to perform his obligation; and we should think it unwise to make bills of exchange, or promissory notes negotiable and payable at a bank, an exception to the uniformity of the rule. We are aware that some of the text-books and decisions of other States make an exception to this rule in favor of bills of exchange, holding that at the close of the usual business hours on the last day of grace, after the liability has become fixed, the right of action has matured, and suit may be commenced on the bill at once; but such a rule would often lead to the necessity of averring and proving the fractional parts of a day, thus making the rights of the parties to a bill of

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exchange less certain, and rendering judicial procedure less uniform and secure.

For these reasons, we hold that the right of action on a bill of exchange, or on a promissory note negotiable and payable at a bank in this State, is not mature until after the close of the last day of grace. As this is a case of first impression in this State, we have no decisions of our own in point, but the following authorities tend uniformly to such a conclusion. *Hathaway v. Hathaway*, 2 Ind. 513; *Bailey v. Ricketts*, 4 id. 488; *Adams v. Dale*, 29 id. 273; *Kirkpatrick v. Alexander*, 44 id. 595; *Abel v. Alexander*, 45 id. 523; *Kirkpatrick v. Alexander*, 60 id. 95; *Helphenstine v. Vincennes Nat. Bank*, 65 id. 582; s. c., 32 Am. Rep. 86.

The judgment is reversed, at the costs of the appellee. The cause is remanded, with instructions to overrule the demurrer to the third paragraph of answer, and for further proceedings.

Judgment reversed.

 STATE EX REL. TIEMAN V. CITY OF INDIANAPOLIS.

(66 Ind. 375.)

Constitutional law — taxation — exemption of widows and maids from.

A statute exempting from taxation property to the amount of \$500 of widows and maids, or any female minor whose father is dead, and whose exempt property does not exceed \$1,000, is unconstitutional because unequal, and not for "charitable purposes."

PROCEEDING for mandamus. The opinion states the case.
The defendant had judgment below.

H. Dailey and W. N. Pickerill, for appellants.

J. A. Henry, for appellee.

BIDDLE, J. Affidavit and motion for a writ of mandate against the city of Indianapolis, to compel the city to refund certain taxes alleged to have been wrongfully collected from the relators. The affidavit states that Maria L. Tieman is the widow of Henry F. C. Tieman, deceased; that Maria H. Tieman and Catharine S. Tieman

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are the sole heirs and unmarried daughters of Henry F. C. Tieman; that, at the death of said husband and father, certain real estate descended to the relators, one-third to Maria L. Tieman as widow, and one-third to each of the said heirs, being unmarried daughters; that for the years 1874, 1875, 1876, and 1877, they paid certain taxes to the said city of Indianapolis, which said city had assessed against said real estate, amounting to \$57.62, which they allege was wrongfully collected, and that they have no other property. Prayer that a writ of mandate may issue in the alternative against the city, commanding said city to refund the said tax to the relators, or show cause against the motion.

The writ is moved for under section 7 of the act of December 21, 1872, Acts 1872, p. 57, which enacts that "The following property shall be exempt from taxation:

"*Eighth.* The property to the amount of \$500, of a widow or unmarried female, or of any female minor whose father is deceased, if her whole estate real and personal not otherwise exempted from taxation does not exceed in value the sum of \$1,000."

An alternate writ of mandate was issued, upon the return of which the city demurred to the writ and affidavit for the want of facts. The demurrer was sustained. Judgment for the city.

On appeal to the General Term, the judgment was affirmed. Appeal to this court.

The appellants insist that the facts averred in the affidavit bring the case within the clause cited, and that the writ of mandate is the proper remedy. We do not now nicely examine these questions, as there is a question underlying the controversy which must first be settled.

Had the general assembly of the State of Indiana the constitutional power to enact the eighth clause of section 7 as above quoted?

The Constitution declares, that "The general assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law." Art. 10, § 1.

If the exemption from taxation claimed in this case can be upheld, it must be under the head of "charitable purposes." A charity, or charitable use, or charitable purpose, means, in law, a

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public charity, use or purpose, which affects the public alike, without reference to an individual, class, or any particular domestic relation. A private charity, dispensed by an individual, out of his own means, the law will not restrain; but a private charity, dispensed by the State, at the expense of her citizens, cannot be upheld. It must be public, benefiting all alike, without reference to individuals or classes as such. It is the character of the property, its use or purpose, and not the character or class of its owner, that may exempt it from taxation. Among the examples which may be given of property used for "charitable purposes," under the Constitution, may be mentioned the Asylum for the Blind, the Institution for the Deaf and Dumb, the Hospital for the Insane, asylums for the poor, and various minor institutions, which inure to the benefit of the public, to all, not to particular individuals or to classes of individuals. To tax the property belonging to these great leading institutions would, for instance, be the same as if the State taxed herself—figuratively speaking, paying out her revenue with one hand and taking it in with the other. The property, therefore, used for such purposes, may be, by law, exempted from taxation. But, in the case before us, the legislature proposes to exempt certain property from taxation, not on account of the use or purpose to which the property is devoted, but because the owner of the property belongs to a particular class of persons, distinguished by sex and domestic relation, namely, a widow, an unmarried female, or a female minor whose father is deceased. It is not contended that the property they owned is used for a "charitable purpose," but is owned and enjoyed privately. The public have no interest in it whatever, except that general interest which it has in the rights of all its citizens. The Constitution contemplates the character and purpose of the property that may be exempted from taxation; not the character and purpose of the owner of the property. If the legislature can exempt the property of widows, unmarried females, and female minors without fathers, from taxation, they can also exempt the property of widowers, unmarried males, and male minors who have no father. By the same principle, we do not see why they might not exempt the property of students, apprentices, milliners, mantua-makers, or any other worthy individuals or classes, which might be supposed less able to bear their proportionate burdens necessary to the State's existence, than the more stalwart and wealthy. It is the use of the property for the

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public benefit which will authorize its exemption from taxation by law. To exempt by law private property, owned by a private person and used for a private purpose, on account of the sex or domestic relation of the owner, is a violation of the constitutional principle, that taxation shall be uniform and equal on all property, both real and personal. The common burden of taxation should be regulated by a fixed general rule, apportioned and sustained by a uniform ratio of equality. Exemption from taxation should be based only on a well-grounded public policy, by which all share in the benefits. In speaking of invidious exemption, Judge COOLEY says: "It is difficult to conceive of an exemption law which selects single individuals or corporations, or single articles of property, and taking them out of the class to which they belong, makes them the subject of capricious legislative favor. Such favoritism could make no pretence to equality; it would lack the semblance of legitimate tax legislation." Cooley on Taxation, 153. Upon the same principle, extra burdens cannot be laid upon individuals or classes, by taxing their property above the uniform rate, as against foreigners, different races or color. A law discriminating against the Chinese, in taxation, has been declared unconstitutional by the courts of California. *Lin-Sing v. Washburn*, 20 Cal. 534.

We have found no case in point with the one before us. We think there are none wherein the favor of exemption from taxation of property was ever granted to an individual on account of sex or domestic relation; but the following text-books discuss the question exhaustively, and the following authorities apply and maintain the constitutional principle with great uniformity: Bouv. Dict., tit. Charitable Uses; Abb. Dict., tit. Charitable Uses; Burroughs' Taxation, 132, 136; Hilliard, Taxation, 71, 106; Cooley, Taxation, 124-174; *Hanna v. Board of Com'rs. of Allen Co.*, 8 Blackf. 352; *Qrr v. Baker*, 4 Ind. 86; *Common Council of Indianapolis v. McLean*, 8 id. 328; *City of Lafayette v. Jenners*, 10 id. 70; *City of Madison v. Fitch*, 18 id. 33; *Lima Township v. Jenks*, 20 id. 301; *Trustees of Methodist Episcopal Church v. Ellis*, 38 id. 3; *O'Neal v. Virginia and Maryland Bridge Company*, 18 Md. 1; *State, etc., v. Parker*, 3 Vroom, 426; *Durach's Appeal*, 62 Penn. St. 491; *Slaughter v. Commonwealth*, 13 Gratt. 767; *Fletcher v. Oliver*, 25 Ark. 289; *Franklin Ins. Co. v. State*, 5 W. Va. 349; *O'Kane v. Treat*, 25 Ill. 557; *Franklin v. Armsfield*, 2 Sneed, 305.

Upon principle, and according to the authorities, it is our plain

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duty to hold that the 8th clause of section 7 of the act of December 21st, 1875, "to provide for a uniform assessment of property, and for the collection and return of taxes thereon," is unconstitutional and void.

Having thus decided the main question in the case, the other questions have become immaterial.

The judgment is affirmed, at the costs of the relators.

Petition for a rehearing overruled.

MILROY V. QUINN.

(60 Ind. 406.)

Guaranty — when notice of acceptance and default requisite.

In case of a collateral guaranty of a debt to be created, of an amount uncertain, variable and unascertainable at the time, the guarantor is not liable without notice of acceptance within a reasonable time, nor without notice of the principal's default.

ACTION on a guaranty. The opinion states the facts. The plaintiffs had judgment below.

J. Applegate, for appellant.

D. P. Baldwin, for appellees.

BIDDLE, J. The amended complaint of the appellees, against the appellant, states the following facts:

That the plaintiffs were partners in business, under the name and style of Quinn & Klinger, and were dealers in tobacco and cigars. Having doubts as to the solvency of Cornelius Conover, who lived in Indiana, the said plaintiffs being residents of Ohio, and Conover having applied to them for a sale of goods, they refused to make him any advance without a guaranty; whereupon the defendant made and delivered to the plaintiff his writing, as follows:

"DELPHI, IND., Jan. 14, '74.

"GENTS—Allow me to say to you, that any cigars that C. Con-

over, of Logansport, Ind., may order from you for the next six months, if he fails to pay you for them, I will stand responsible to you for them.

"Yours very respectfully,

"SAM'L L. MILROY.

"To QUINN & Klinger, Eaton, Ohio."

Which writing the plaintiffs received, and upon the faith thereof, and within the six months next succeeding January 14th, 1874, upon Conover's order, sold and delivered to him one thousand dollars' worth of cigars; that Conover failed to pay for the cigars, but became in default to the plaintiff in said sum of one thousand dollars; that July 7th, 1874, plaintiffs notified the defendant of said default; that plaintiff sued Conover in the Cass Circuit Court, and April 30th, 1875, recovered judgment against him for eight hundred and seventy-five dollars, and costs taxed at twenty-five dollars, upon which execution was issued and returned wholly unsatisfied, and no part of the debt has ever been paid. Prayer for judgment.

The complaint seems to have been hastily drawn, and is not complete in all its averments; yet, if the notice given by the plaintiffs to the defendant, of Conover's default in making payment as averred, is sufficient, we think in other respects the complaint can be held good.

A demurrer for want of facts was overruled to the amended complaint. The second, third and fourth paragraphs of answer, to which separate demurrers for the want of facts were sustained, also present the question as to the sufficiency of the notice to the defendant of Conover's default. Issues of fact were joined on several other paragraphs of answer, and a trial had by the court, resulting in a special finding and conclusions of law, in favor of the appellees; judgment thereon and appeal.

The assignments of error in this court properly present the questions discussed:

1. It is insisted, that the notice given by the appellees to the appellant, as alleged in the complaint, was not given in time to bind the appellant; but as we cannot see by the complaint at what time the credit was given to Conover, we cannot say that it is insufficient for this reason. Perhaps the complaint could have been, and should have been, made more certain on motion; yet as against a demurrer for want of facts, we must hold it good.

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2. We may notice the rulings on the demurrers to the second, third and fourth paragraphs of the answer, together. Each paragraph, more or less specifically, denies the sufficiency of the notice to the appellant. The general denial covers the same ground; and as that was in at the trial, there is no available error on the rulings on the demurrers to the special paragraphs.

3. The exceptions to the conclusion of law on the special finding by the court:

The finding shows that the plaintiffs were partners in the tobacco and cigar trade, in Eaton, Ohio; that Conover lived in Logansport, Indiana, and the defendant was a resident of Carroll county, Indiana; that he made the guaranty, and that it was received by the plaintiffs soon after its date; that the plaintiffs, relying on the guaranty, "and solely on account thereof, sold said Conover, within six months after the date of said guaranty (which is dated January 14, 1874), goods in their line to the amount of \$3,000.00. Monthly statements of the goods thus sold by Quinn & Klinger were rendered to Conover, and his acceptances therefor were received by them, and used in connection with said guaranty in bank as collateral security to raise money upon, and such as were not paid at maturity by Conover were taken up by said Quinn & Klinger; and all such acceptances were taken up by them before the expiration of said guaranty, that is, before the 14th day of July, 1874. Some of said acceptances were not paid at maturity, and others given in lieu thereof, by said Conover, without the knowledge of the defendant, were all taken up and held by said Quinn & Klinger before the expiration of said guaranty."

The amount due the plaintiffs was then found, and the judgments against Conover stated, as averred in the complaint, and that they remained unpaid.

It was further found, that "on the 7th of July, 1874, Quinn & Klinger notified said Milroy by letter, that Conover had failed to pay them for a part of the goods they had furnished under said guaranty, but did not specify the amount remaining unpaid." Also that Baldwin & Winfield, attorneys for the plaintiffs, on the 30th day of November, 1874, before the commencement of this suit, notified the defendant of Conover's default in making payment to the plaintiffs, and that the amount still due was \$850.

The court stated the conclusion of law, as follows: "Upon the facts above found, I hold, as a conclusion of law, that defendant,

Milroy, is liable to the plaintiffs for said unpaid balance. Wherefore I find for the plaintiffs the sum of \$976.80."

Was it necessary that the guarantee should give the guarantor notice that he had accepted the guaranty, of his action under it in selling the goods to Conover, and of Conover's failure to meet his acceptances given in payment therefor, in order to fix the liability of the guarantor? It seems to us that this is the controlling question in the case.

Guaranties are expressed in so many different forms, and are applicable to so many different conditions of things, that it sometimes becomes difficult to give them their true interpretation. They are often merely proposals to guarantee, sometimes mere recommendations, and frequently little more than expressions of friendship, confidence or courtesy. Sometimes they guarantee what is fixed and known; sometimes something to be done, or brought into existence; sometimes they are continuing, sometimes limited to a single transaction; sometimes direct and sometimes collateral; and always refer to something beyond themselves. They are not like bills of exchange, promissory notes, indorsements, assignments, deeds of conveyance and ordinary contracts, which, from frequent use, have become settled in their forms, and their meaning established by continuous and uniform adjudications. Guaranties are capable of classification, however, and have fixed rules of interpretation, but which are not always easy of application to given cases. For these reasons the authorities do not always harmonize. But the rule seems to be settled, that when the guaranty is direct, and the thing guaranteed definite in its amount, and known to the guarantor at the time he gives his guaranty, neither notice of the acceptance of the guaranty, nor the default of his principal, need to be given to the guarantor; for he knew when he made the guaranty the full extent of his liability. But when the guaranty is collateral, and the debt guaranteed yet to be created, the amount of which is uncertain, and may be variable, and cannot be known to the guarantor at the time he makes the guaranty, notice within a reasonable time, by the guarantor by the guarantee, of his acceptance of the guaranty, and of the default of the principal, is necessary, or the guarantor will be discharged; for he cannot, without such notice, know that the guaranty is accepted, nor of the default of his principal, nor the extent of his liability, and cannot protect himself from loss by the principal debtor.

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It seems to us that the guaranty before us falls within the latter class. There is nothing in the finding of the court to show that the appellant knew his guaranty had been accepted, nor that the appellees had sold the goods to Conover upon the faith of the guaranty, nor that Conover had made default in payment therefor, nor of the amount of the liability, until the 7th day of July, 1874, within a week of the expiration of the guaranty; while during the five months which had intervened, the appellees were selling goods to Conover, to the amount of \$3,000, and receiving his monthly acceptances therefor, some of which he failed to meet, and several of which were finally taken up by the appellees. Under the circumstances the notice was too late. At the time it was given it was practically useless to the appellant. The debt had been created. Conover had failed to meet his acceptances; all of which was known to the appellees months before they gave notice to the appellant. This state of facts, we think, should discharge the guarantor.

The appellees rely upon the case of *Jackson v. Yandes*, 7 Blackf. 526. The guaranty in that case was similar to the one in this case, except that it concluded with the following words: "This is to be construed as a continuing letter of credit and binding on us until countermanded." The guarantors having thus undertaken to be responsible till they countermanded their guaranty, notice was clearly unnecessary. In the case of *Smith v. Bainbridge*, 6 Blackf. 12, which was founded upon a similar guaranty, without the concluding words above quoted, the court held that notice to the guarantor was necessary. See, also, *Gaff v. Sims*, 45 Ind. 262.

The following authorities essentially cover the ground of guaranties, illustrate the principles governing them, and more or less directly support this opinion: *Burns v. Semmes*, 4 Cr. C. C. 702; *Edmondston v. Drake*, 5 Pet. 624; *Lee v. Dick*, 10 id. 482; *Adams v. Jones*, 12 id. 207; *Shewell v. Knox*, 1 Dev. 404; *Stafford v. Low*, 16 Johns. 67; *Reynolds v. Douglass*, 12 Pet. 497; *McIver v. Richardson*, 1 M. & S. 557; *Babcock v. Bryant*, 12 Pick. 133; *Thomas v. Davis*, 14 id. 353; *Clark v. Remington*, 11 Metc. 361; *Kincheloe v. Holmes*, 7 B. Monr. 5; *Steadman v. Guthrie*, 4 Metc. (Ky.) 147; *Payne v. Ives*, 3 D. & R. N. P. 664; *Smith v. Anthony*, 5 Mo. 504; *Rankin v. Childs*, 9 id. 673; *Lawton v. Maner*, 9 Rich. 335; *Solles v. Meugy*, 1 Bailey, 620; *Wardlaw v. Harrison*, 11 Rich. 626; *Mozby v. Tinkler*, 1 Crompt. M. & R. 692; *Birks v. Trippet*, 1 Sand. 32; *Beobe v. Dudley*, 6 Fost. (N. H.) 249; *Cramer v. Hig-*

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ginson, 1 Mason, 326; *Allen v. Pike*, 3 Cush. 238; *Wildes v. Savage*, 1 Story, 22; *Bradley v. Cary*, 8 Greenl. 234; *Norton v. Eastman*, 4 id. 521; *Tuckerman v. French*, 7 id. 115; *Howe v. Nichols*, 22 Me. 175; *Craft v. Isham*, 13 Conn. 28; *Menard v. Scudder*, 7 La. Ann. 385; *Bank of Illinois v. Sloo*, 16 id. 539; *Patterson v. Reed*, 7 W. & S. 144; *Kellogg v. Stockton*, 29 Penn. St. 460; *Taylor v. McClung*, 2 Houst, 24; *McCullum v. Cushing*, 22 Ark. 540; *Central Savings Bank v. Shine*, 48 Mo. 456; s. c., 8 Am. Rep. 112; *Montgomery v. Kellogg*, 43 Miss. 486; s. c., 5 Am. Rep. 508; *Clafin v. Briant*, 58 Ga. 414; *Mayfield v. Wheeler*, 37 Tex. 256; *Geiger v. Clark*, 13 Cal. 579. See, also, the text-books: 2 Story on Cont., § 1133; Add. on Cont. § 1115; Brandt on Suretyship & Guar., §§ 157-163; Wade on Notice, §§ 378, 380, 386, 406.

According to the main current of these authorities, we think the court erred in the conclusion of law upon the special finding of facts.

The judgment is reversed, at the costs of the appellees; cause remanded, with instructions to state the conclusions of law, upon the finding of facts, in favor of the appellant, and to render judgment accordingly.

Judgment reversed and cause remanded.

SMITH V. YARYAN.

(69 Ind. 445.)

Seduction — evidence.

In an action by an unmarried woman for her own seduction, it is improper to ask her on cross-examination, for the purpose of impeaching her character, if she had not had sexual intercourse with other men; but if a child had been born as the result of the alleged seduction, the inquiry is proper on the question of paternity, in order to mitigate damages.

ACTION of seduction. The opinion states the facts. The plaintiff had judgment below.

W. P. Britton, M. W. Bruner, T. L. Stillwell and H. H. Dechterman, for appellant.

E. C. Snyder, for appellee.

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WORDEN, J. Complaint by the appellee, against the appellant, as follows:

"Electa Yaryan, plaintiff, being an infant under the age of twenty-one years, by her next friend," etc., "complains of George W. Smith, defendant, and says that she is now and always has been unmarried; that on or about the — day of January, 1876, said defendant, being an unmarried man, began paying his attentions to, and to wait upon, said plaintiff; that afterward, to wit, on the 14th day of July, 1876, and at divers other times thereafter, said defendant, having by his visits and attentions, and expressions of love and affection, gained the confidence and affections of the plaintiff, importuned her to sexual intercourse with him; and she, through her confidence in and love for him, yielded to his solicitations and had illicit carnal intercourse with him; that, by reason of said intercourse, she became sick and pregnant with child, by reason of which she was for a long time, to wit, one year, rendered unable to work and perform her usual services; that in consequence of the wrong done her by said defendant, she has suffered much in body and mind, and has been damaged in the sum of \$3,000. Wherefore," etc.

Issue was joined, and the cause tried by a jury, resulting in a verdict and judgment for the plaintiff, for the sum of \$1,000.

The statute gave the plaintiff the right of action in the following language: "Any unmarried female may prosecute as plaintiff an action for her own seduction, and may recover therein such damages as may be assessed in her favor." Code, § 24.

[Omitting a minor question.]

On the trial of the cause, the plaintiff was a witness on her own behalf, and testified, among other things, that the defendant commenced paying attentions to her in January, 1876, and continued his visits up to April, 1877; at first he came once in two weeks, then once a week, and after July, 1876, as often as two or three times a week, remaining sometimes until 12 o'clock at night, and sometimes until 2 or 3 o'clock in the morning; that on the night of July 14th, 1876, in consequence of the love she bore to the defendant, and the confidence she placed in him, she yielded to his solicitations for sexual intercourse with him, and had such intercourse with him on other occasions after that. As the result of such intercourse, she gave birth to a child on April 12, 1877.

On the cross-examination, the defendant's counsel propounded

to the plaintiff, as such witness, the following questions, viz.: "1st. Did you not have sexual intercourse with Howard Pierce, on or about the 14th day of July, 1876? 2d. Did you not have sexual intercourse with Howard Wilcox, on or about the 14th day of July, 1876? 3d. Did you not have sexual intercourse with Scott Steele, on or about the 14th day of July, 1876? 4th. Did you not have sexual intercourse with Howard Pierce, Scott Steele and Howard Wilcox, at various times, on, after and before the 14th day of July, 1876?"

These questions were severally objected to by counsel for the plaintiff, and the objections were sustained. Exceptions by the defendant. These questions were asked, as is shown by the record, "for the purpose of showing whether the defendant was the father of said bastard child," as well as for some other purposes.

It is abundantly established, that in an action for seduction, the woman seduced cannot be asked, on cross-examination, for the purpose of showing her bad character, whether she has not had criminal intercourse with other men, nor for the purpose of impeaching her if she deny it. *Shattuck v. Myers*, 13 Ind. 46; *Bell v. Rinker*, *supra*; 5 Wait Act. & Def. 667; 1 Greenl. Ev., § 458; 2 id., § 577; *Hoffman v. Kemerer*, 44 Penn. St. 452; *Doyle v. Jessup*, 29 Ill. 460. In the language of this court, in the case of *Bell v. Rinker*, *supra*, "Character could not be either attacked or sustained by proof of specific acts."

But the question arises, whether the questions propounded were not competent for the purpose indicated, viz., to show the paternity of the child.

The statute above set out, giving an unmarried woman the right to prosecute an action for her own seduction does not furnish any measure or criterion of damages, except "such as may be assessed in her favor." We suppose she could not recover, in such action, any thing for the support and maintenance of a bastard child, because that is provided for in the act on the subject of bastardy.

But where a child is born as the result of the seduction, the fact of such birth could not fail to be considered by a jury in estimating the damages to which the plaintiff would be entitled for the seduction. Indeed, it would seem to be a very proper element to be considered in assessing the damages.

There might, however, be a seduction, and the party seduced might give birth to a child having a paternity other than that of

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the seducer. In such case, the damages against the seducer ought not to be enhanced in consequence of the birth of such child.

The question was before the jury, whether the defendant was or was not the father of the child, because, if he was, the pregnancy of the mother and birth of the child were proper matters to be considered by the jury, in assessing the plaintiff's damages; and if he was not, such pregnancy and birth could not have been properly taken into consideration.

It seems to us, therefore, that the question, whether the defendant was the father of the child, must be tested in the same manner as if the prosecution were for bastardy.

So far as this point in the case is concerned, the question arising is the same as that arising in bastardy, and we see no reason for departing from the established practice in bastardy cases in this particular. It is well established that in bastardy cases it is competent to ask the prosecuting witness, on cross-examination, whether she had had sexual intercourse with any other person than the defendant, about the time the child was begotten. *Walker v. State*, 6 Blackf. 1; *Hill v. State*, 4 Ind. 112; *Townsend v. State*, 13 id. 357; *Whitman v. State*, 34 id. 360.

The plaintiff, as has been seen, testified that she first had sexual intercourse with the defendant on the 14th of July, 1876, and that her child was born on April 12th, 1877. Hence, according to the usual period of gestation, the child must have been begotten about the time indicated by the first three questions above set out, viz., July 14, 1876.

We are of the opinion, therefore, that the first three questions were competent, and that the objection to them was improperly sustained. No error was committed in sustaining the objection to the fourth question, as that covered such time as made it irrelevant and incompetent for any purpose.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

Judgment reversed, and cause remanded.

NATIONAL BANK OF ROCKVILLE V. SECOND NATIONAL BANK OF
LAFAYETTE.

(99 Ind. 479.)

Negotiable instrument — check — action on unaccepted, against drawee.

No action can be maintained on an unaccepted check against the drawee. (*See note, p. 288.*)

ACTION on check. The opinion states the case. The defendant had judgment below.

G. S. Orth, J. Park and J. A. Stein, for appellant.

J. M. Larue and F. B. Everett, for appellee.

BIDDLE, C. J. Complaint in three paragraphs, by the appellant against the appellee, on a bank check. A. T. Colton is the maker of the check, the appellant is the payee, and the appellee is the drawee. Demurrer for want of facts sustained to the first and third paragraphs of the complaint. Answer of general denial to the second paragraph. Trial by jury, and special verdict for appellee; motion for a *venire de novo* overruled; motion for a new trial overruled; motion in arrest of judgment overruled; exceptions; judgment; and appeal.

We need not particularly state either the first or third paragraphs of the complaint. Each sets out the check and avers its presentation for payment, by the payee. There is no averment of its acceptance by the drawee, in either paragraph; indeed, each paragraph avers that the drawee refused to accept the check. In other respects these two paragraphs are well pleaded. Breach, non-payment of the check.

A bank check has all the requisites of a bill of exchange, except that it is due on demand, without days of grace, and if dishonored, requires no protest for non-acceptance nor for non-payment. There is no implied contract in favor of the payee, against the drawee, that he will either accept or pay the check. The drawee is no party to the check until he accepts it; and a party cannot be sued on an express contract before he enters into it. The fact that the drawee has funds in his hands, belonging to the drawer, sufficient

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to pay the check, does not change the rule. The case of *National Bank v. Eliot Bank*, 5 Am. Law Reg. 711, is in point. We believe there is no decided case contrary to it. ABBOTT, J., delivers a long and ingenious dissenting opinion, but we cannot regard it as sound. He places the right of the payee to sue the drawee for non-acceptance or non-payment of the check, upon the ground, that when a first party contracts with a second party to pay a sum of money to a third party, the third party, although not a party to the contract, may sue the first party upon the contract and recover. This is true upon express contracts; but there is no implied contract in such cases, that the first party shall pay the third party. Hence the necessity of an express acceptance of the check, before the drawee is liable. In the case put as an illustration, the drawer of the check is the first party, the drawee the second, and the payee the third. Now, as there is no implied contract between the drawee and the payee, he cannot sue the drawee upon the check, until he has accepted it. There are other convincing reasons in our minds against the rule contended for. If the drawee, having funds, refuses to pay the drawer's check, he becomes liable thereby to the drawer, and the drawer becomes liable to the payee. Now, if in such case the drawee was also liable to the payee, and the payee had his right against both the drawer and the drawee, this complication would take the qualities of commercial paper from the check, and place it upon the ground of a common-law contract; and to apply this principle to foreign and inland bills of exchange, the great movers and upholders of the world's business would be to embarrass, if not destroy, their usefulness in civilization, and impair the commercial faith of mankind. There are no implied contracts in commercial paper, and it must not be embarrassed by secret equities; and that express contracts touching it can be made in any other manner than in writing, is the constant regret of the ablest jurists.

These views are fully supported by the following authorities: Edw. on Bills, 405; Byles on Bills, 18; *Glenn v. Noble*, 1 Blackf. 104; *St. John v. Homans*, 8 Mo. 382; *Chapman v. White*, 6 N. Y. 412; *Bullard v. Randall*, 1 Gray, 605; *Pope v. Luff*, 7 Hill, 577; *Griffin v. Kemp*, 46 Ind. 172; *Pollard v. Bowen*, 57 id. 232; *Henshaw v. Root*, 60 id. 220.

Under the authorities, we must hold the first and third paragraphs of the complaint insufficient.

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The appellant relies upon the case of *Wilson v. Dawson*, 52 Ind. 513; but in that case, the bank—the depositary—was not a party to the suit; besides, the money was deposited under an express agreement, and for an express purpose. In this case, as the money was deposited with the drawee generally, there is no express contract, and the bank—the depositary—is a party. We can see no analogy between the two cases.

[Omitting *obiter dicta*.]

It appears to us that the whole question turns upon the acceptance or non-acceptance of the check by the drawee. As we have held, as a principle of law, that the drawee is not liable, unless the check was accepted, and as the jury have found that it was not accepted, it follows that the appellant cannot recover. The facts found by the jury in the special verdict are the same in substance, and almost literally indeed, as those averred in the first and third paragraphs of the complaint. As we have held these paragraphs insufficient in law to constitute a cause of action, it follows again, that the appellant cannot recover; and we think the following authorities sustain us fully. *Johnson v. Collings*, 1 East, 98; *Levy v. Cavanagh*, 2 Bosw. 100; *Dykers v. Leather Manufacturers' Bank*, 11 Pai. 612; *Luff v. Pope*, 5 Hill, 413.

[Unimportant matters omitted.]

The judgment is affirmed, at the costs of the appellant.

Judgment affirmed.

NOTE BY THE REPORTER.—See, to same effect, *Attorney-General v. Continental Life Ins. Co.*, 71 N. Y. 325; s. c., 27 Am. Rep. 55, and references.

In *Rosenthal v. Martin Bank*, United States Circuit Court, Southern District of New York, November, 1879, the same doctrine was held, BLATCHFORD, J., observing:

"The question presented for decision is, whether the Metropolitan National Bank ought to pay the \$1,998 which it owes, as a debtor to the plaintiff. It is contended for the plaintiff, that he could have sued the drawee, on the draft, before its acceptance, and even before presenting it to the drawee, and that the assignment to the defendant, Coates, after the drawing of the draft and before it was presented to the drawee, did not carry to Coates the title to the \$1,998 or affect the right of the plaintiff thereto; that Coates took the property of the assignor, under the assignment, subject to all the equities existing against it in favor of the plaintiff; that Coates succeeded only to the rights of the assignor, and that the drawing of the draft operated as an assignment to the plaintiff of \$1,998, then in the hands of the drawee.

"It was decided by the Supreme Court of the United States in *Bank of Republic v. Millard*, 10 Wall. 152, that the holder of a check drawn on a bank cannot sue the bank for refusing payment of it, in the absence of proof that it was accepted by the bank or was charged against the drawer. In that case the court say: 'It is no longer an open question in this court since the decisions in the cases of *Marine Bank v. Fulton Bank*, 2 Wall. 232, and of *Thompson v. Riggs*, 5 Id. 663, that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations

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so the contrary, they belong to the bank, become part of its general funds and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one and has nothing of the nature of a trust in it.' This subject was fully discussed by Lords COTTENHAM, BROUGHAM, LYNDHURST and CAMPBELL in the House of Lords, in the case of *Foley v. Hill*, 2 H. L. Cas. 28, and they all concurred in the opinion that the relation between a banker and a customer who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authority is to the same effect. All checks on bankers are in constant use, and have been adopted by the commercial world generally as a substitute for other modes of payment, it is important for the security of all parties concerned, that there should be no mistake about the status which the holder of a check sustains toward the bank on which it is drawn. It is very clear that he can sue the drawer if payment is refused, but can he also in such a state of case sue the bank? It is conceded that the depositor can bring assumpsit for the breach of the contract to honor his checks; and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise for the same thing existing in two distinct persons at the same time.

"On principle there can be no foundation for an action on the part of the holder unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the bank and the holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it; and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If then the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted? The right of the depositor, as was said by an eminent judge (GARDNER, J., in *Chapman v. White*, 3 Seld. 417), is a chose in action, and his check does not transfer the debt or give a lien upon it to a third person without the assent of the depository. This is a well-established principle of law and is sustained by the English and American decisions. *Chapman v. White*, 3 Seld. 412; *Butterworth v. Peck*, 5 Bosw. 341; *Dillard v. Randall*, 1 Gray, 905; *Harker v. Anderson*, 21 Wend. 373; *Dykens v. Leather Mfg. Co.*, 11 Pal. 616; *National Bank v. Elliot Bank*, 5 Am. Law Reg. 711; *Pars. on Bills and Notes* (ed. of 1863), pp. 59 to 61 and notes; PARKER, B., in assignment, in *Bellamy v. Majoribanks*, 8 Eng. Law & Eq. 522, 523; *Wharton v. Walker*, 4 B. & C. 163; *Warwick v. Rogers*, 5 Mann. & Gr. 374; *Byles on Bills*, ch. Check on a Banker; *Grant on Banking* (London ed., 1856), p. 967.

"The few cases which assert a contrary doctrine it would serve no useful purpose to review.

"The decision in the case cited is for this court the law of this case; so far then as this suit is a suit on the draft against the drawee to recover the amount of the draft, it cannot be maintained, for the draft was not accepted by the drawee, nor was it charged by the drawee against the drawer. The draft was a draft or check in the ordinary form, not describing any particular fund, or using any words of transfer of the whole or any part of any amount standing to the credit of the drawer, but containing only the usual request. Under the settled law of New York, where the draft was payable, this was not an assignment of the funds of the drawer in the hands of the drawee. *Att'y-Gen. v. Continental Life Ins. Co.*, 71 N. Y. 323, 330, 331; s. c., 37 Am. Rep. 55. Before the draft was accepted the drawer could withdraw the deposit or countermand the draft."

STILWELL V. KNAPPER.

(99 Ind. 538.)

Will—devise—restraint of marriage.

A devise to the testator's wife, "during her natural life or widowhood," with remainder, "after her death or marriage," to her children, is on condition of remaining unmarried, and is void under the statute as in restraint of marriage. (*See note, p. 254.*)

ACTION for rents and profits. The opinion states the case. The defendant had judgment below.

H. H. Dochterman and M. Milford, for appellants.

W. A. Tipton and S. F. Wood, for appellee.

WORDEN, J. Carrie F. Steely brought this action below, against Henry F. Knapper,, and failing to recover, appealed to this court. Since the appeal Thomas L. Stilwell has intermarried with the original appellant, and has joined in the appeal. Code, § 554.

The complaint consisted of two paragraphs, but the second was withdrawn, and a demurrer for want of sufficient facts, to the first, was sustained. The plaintiff declining to answer, final judgment was rendered for the defendant.

The first paragraph of the complaint alleged that the plaintiff, Carrie D. Steely, was an infant of the age of nineteen years, who prosecuted her suit by her next friend, Thomas L. Stilwell; that on the 19th day of November, 1864, John Steely, the father of the plaintiff, died testate in Fountain county, Indiana, leaving surviving him his wife, Mary Steely, and his children by her, viz., Mortimer F. Steely, John N. Steely, Viola L. Steely, Margaret E. Steely, and the plaintiff, Carrie D. Steely, as his only heirs; that John D. Steely died seized in fee of certain lands in Fountain county, Indiana, which are described, containing 479.25 acres; that he also died seized of other real property in that county, and personal property of the value of ten thousand dollars; that John Steely made and published his last will, a copy of which is set out in full in the paragraph. The following are the portions of the will on which the question here involved depends:

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"I give and bequeath to my wife, Mary Steely, all my real and personal property, moneys and effects, that I may possess at the time of my decease, except so much as shall be necessary to defray my funeral expenses and pay my just debts, to be hers during her natural life or widowhood; after her death or marriage, and after my youngest child that may then be living shall arrive at the age of twenty-one years, to be equally divided between my children Mortimer F., John N., Viola L., Margaret E. and Carrie D. Steely, to have and share alike. Nothing above said is intended to take from my said wife, Mary Steely, the right to hold in her own name all right, title, interest and appurtenances to the following real estate which descended to her from her parents, to wit:" (Here certain lands are described other than those described in the complaint as lands of which the testator died seized.) "She is not, in case she sells said described lands, to use the proceeds in any other way than to invest it in other real estate for the benefit and use of the above-named five children, to be theirs after death."

Mary Steely was by this will nominated as executrix.

The paragraph proceeds to allege that the will was duly admitted to probate; that Mary Steely qualified and gave bonds as such executrix, and settled up the estate; that she, as such widow of John Steely, accepted the provisions made for her by the terms of said will of John Steely, instead of her rights in the real and personal property of said John Steely under the law, including her absolute claim, and accepted the benefit made by said will, and has enjoyed the same as fully as she could; that on the 20th day of September, 1866, said Mary Steely was married to the said defendant Henry F. Knapper.

The paragraph further alleges that the plaintiff, by virtue of the will, and the acceptance of its provisions by Mary Steely, and the intermarriage of the latter with the defendant, Henry F. Knapper, "became the owner in fee of the undivided one-fifth of the land herein first described, of which said John Steely died seized, and was, at the date of said marriage and ever afterward, entitled to the possession of such undivided one-fifth of said lands and the rents and profits of the same from such marriage until this date."

The paragraph proceeds further to allege that the lands have never been parted between the devisees; that on the 20th day of September, 1866, the defendant, Knapper, took possession of the lands,

and has ever since had and enjoyed the rents and profits thereof, and seeks to recover the plaintiff's share or the rents and profits.

The paragraph sets out the matters much more in detail, but the above statement will be sufficient to develop the point upon which the case must be decided.

If the will of the testator, in legal effect, gave to Mary Steely a life-estate in the property devised absolutely, and not dependent upon her remaining a widow, then it follows that neither the plaintiff, nor any of the other children of the testator, will have any right to the lands, or the rents and profits thereof, until the termination of the life-estate; and the demurrer to the paragraph of complaint was correctly sustained. We proceed, therefore, to inquire what estate Mary Steely took under the will?

It is due to counsel to remark that we have been favored with able and exhaustive briefs, that have facilitated our researches and saved us much labor in the examination of the question involved.

The question involves the legal effect of the words in the will, "to be hers during her natural life or widowhood," taken in connection with the other portions of the will. If the words quoted, construed with the residue of the will, import that Mary Steely is to have a life-estate in the property devised, on condition that she remain a widow during that time, the life-estate will be absolute, and the condition will fall, inasmuch as we have a statute which provides that "A devise or bequest to a wife with a condition in restraint of marriage shall stand, but the condition shall be void." 2 R. S. 1876, p. 571.

The following summary of the law, on the subject of conditions in wills in restraint of marriage, is found in 1 Story on Eq. (11th ed.), § 280.

"The general result of the modern English doctrine on this subject (for it will not be found easy to reconcile all the cases) may be stated in the following summary manner. Conditions annexed to gifts, legacies, and devises, in restraint of marriage, are not void, if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then, indeed, as a condition against public policy, and the due economy and morality of domestic life, it will be held utterly void. And so, if the condition is not in restraint of marriage generally, but still the prohibition is of so rigid a nature, or so tied up to peculiar cir-

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cumstances, that the party, upon whom it is to operate, is unreasonably restrained in the choice of marriage, it will fall under the like consideration. Thus, where a legacy was given to a daughter, on condition that she should not marry without consent, or should not marry a man who was not seized of an estate in fee-simple of a clear yearly value of £500, it was held to be a void condition, as leading to a probable prohibition of marriage. [And in a later case it was held that a general condition in restraint of marriage is good as to the testator's widow, but not good in respect to any other person."]

The "later case," above alluded to, is probably that of *Lloyd v. Lloyd*, 2 Sim. (N. S.) 255, where it was held by the vice-chancellor, that "according to the authorities, such a condition is not void as to the wife, the law recognizing in a husband such an interest in his wife's widowhood as to make it lawful for him to restrain her from making a second marriage, by imposing a condition that on such marriage any provision he may have made for her shall cease. And with regard either to his wife or to any other woman, a testator may make a gift so long as she shall remain single; but if he first gives a life-estate to a single woman, a stranger to him, and then annexes a condition that in case she marries at all, it shall go over, that being in general restraint of marriage, is not a good condition." See *Morley v. Rennoldson*, 2 Hare, 571.

We deem it unnecessary to determine whether our statute has done any thing more than to place the widow of the testator upon a common level with other persons, in respect to restraints upon marriage; in other words, whether such reasonable restraints as would be upheld in regard to other persons may not be upheld in regard to such widows, under the statute above quoted. The statute may be construed to prohibit all restraints whatever upon marriage, or only such general restraint as could not be imposed upon others.

If the will in this case shall be regarded as containing a condition in restraint of marriage at all, the condition is general, interdicting marriage altogether, and must fall. It is apparent that the case turns upon the question whether the words "or widowhood," as used in the will, in the sentence "to be hers during her natural life or widowhood," taken in connection with the other parts of the will, are to be regarded as importing a condition, or only a limitation. If they are words of condition, the condition is void.

If they are words of limitation only, the estate of Mary Steely terminated at her marriage.

In the solution of the question involved, sight must not be lost of the devise over to the children of the testator after the death or marriage of his widow; for there may be cases, where there is a devise over, in which words that would otherwise be regarded as words of condition, will be regarded as words of conditional limitation.

Thus it is said: "If the condition subsequent be followed by a limitation over to a third person, in case the condition be not fulfilled, or there be a breach of it, that is termed a conditional limitation." 4 Kent Com. 126.

Blackstone says: "Yet, though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representative (as if an estate be granted by A to B, on condition that within two years B intermarry with C, and on failure thereof then to D and his heirs), this the law construes to be a limitation and not a condition; because if it were a condition, then, upon the breach thereof, only A or his representatives could avoid the estate by entry, and so D's remainder might be defeated by their neglecting to enter; but when it is a limitation the estate of B determines, and that of D commences, and he may enter on the lands the instant that the failure happens." 2 Bl. Com. 155.

In Preston on Estates, 49, 50, it is said: "It is the well-known property of a condition, to defeat the estate before the completion of the period to which the estate may continue under the limitation. * * * It may also be noticed, that where a particular estate is created by will, and a qualification in the nature of a condition is annexed to the disposition of that estate, and another estate is limited by the same will, after the estate to which the condition is annexed, the condition is not distinct from the limitation; it forms part of the limitation, and circumscribes the continuance and extent of that estate to which the qualification is annexed." See, also, 1 Fearn on Remainders, 271.

The doctrine above stated can have no application to the present case, however, unless there was a valid devise over of the remainder, or some part of it, after the termination of the estate devised to Mary Steely. Indeed, the doctrine is expressly limited to cases of

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a conditional devise over. If there was no devise over, the reason of the doctrine, as stated by Blackstone, utterly fails, for there is no one to be kept out of an estate by the failure of the heirs of the testator to enter for condition broken. And it may be added, if there was no devise over, there is no one to complain that the commencement of the estate devised to him is postponed, contrary to the intention of the testator. If there was no devise over, there is no reason for converting what would otherwise be a condition into a conditional limitation. Viewing the plaintiff as an heir of the testator, and not as a devisee, there is no reason for construing the words "or widowhood," as used in the will, as a conditional limitation, if they import a condition rather.

We are led, therefore, to inquire whether there was any valid devise over to the children of the testator.

It seems to us that by the terms of the will they took just the estate which the law would have cast upon them by descent, had they not been mentioned in the will at all. If that is the case, the devise to them is a nullity, and they must be deemed to have taken by descent and not by purchase. If the will had stopped after having devised the property to Mary Steely "to be hers during her natural life or widowhood," and had not disposed of the remainder at all, the children of the testator would have inherited the reversion equally; and this is what the will attempts to devise to them.

They, therefore, as before stated, take by inheritance, the devise to them being void. It is said by Chancellor KENT, 4 Kent Com. 306, that "A devise to the heir at law is void, if it gives precisely the same estate that the heir would take by descent if the particular devise to him was omitted out of the will. The title by descent has, in that case, precedence to the title by devise. The test of the rule, says Mr. Crosley, is to strike out of the will the particular devise to the heir, and then, if without that he would take by descent exactly the same estate which the devise purports to give him, he is in by descent and not by purchase. Even if the lands be devised to the heir charged with debts, he still takes by descent; for the charge does not operate as an alteration of the estate."

In the case of *Ellis v. Page*, 7 Cush. 161, it is said, among other things: "It makes no difference as to the operation of this rule, that the land comes to the heir charged with payment of annuities or legacies, nor that the testator devises the land to one for life,

remainder to his heir at law in fee, in which latter case the heir is in, on the termination of the life-estate, by descent and not by purchase."

If the children of the testator be regarded as having taken under the will, the remainder became vested in them immediately upon the death of the testator, though not to be enjoyed in possession until the termination of the estate devised to Mary Steely, just as the reversion would vest in them by descent; so that, in this respect, they took the same estate by descent as by the will. And the direction in the will, that the land should not be divided between the children until the youngest one should become of age, did not change the tenure of the property. Indeed, it is said in a note to the case of *Scott v. Scott*, 1 Eden, 458, referring to authorities, that "a mere alteration as to the time of the heir's coming to the estate does not create such a difference in point of estate as to prevent him from taking by descent."

If a testator should provide in his will, that his lands should not be parted among his children until the youngest should become of age, this, doubtless, would be effectual to prevent partition until that time should arise. 2 R. S. 1876, p. 347, § 10. Yet it is clear that such a provision would not make the children purchasers rather than heirs. They would take the land as heirs and not as devisees.

But it is insisted by counsel for the appellant, as we understand their brief, that the devisees must be regarded as taking by purchase and not by descent, because they are named in the will, and mentioned as "children" and not as heirs; and the rule in *Shelley's* case is cited as illustrative of the point.

It may be conceded that under the rule in *Shelley's* case, if there be a devise to A for life, with remainder over in fee to his heirs, or the heirs of his body, the fee vests in A, and the heirs take by descent and not by purchase. But if there be a devise to A for life, with remainder over in fee to his "children," the children take by purchase, and not by descent. *Sorden v. Gatewood*, 1 Ind. 107; *Doe v. Jackman*, 5 id. 283; *Siceloff v. Redman's Adm'r*, 26 id. 251; *McCray v. Lipp*, 35 id. 116; *Andrews v. Spurlin*, id. 262; *Nelson v. Davis*, id. 474.

But we do not see that the rule in *Shelley's* case has any application to, or throws any light upon, the question here involved. The rule in *Shelley's* case, where it arises upon a will, raises no question whether there is a valid devise over after the termination of the

life-estate, but always goes on the theory that there is a valid devise over. Otherwise, the devisee for life could not take the fee, as he does where the property is devised to him for life with remainder in fee to his heirs. Again, under the rule in *Shelley's* case, the heirs of the devisee for life take by virtue of the will, though they take as heirs of the life-tenant, for without the will they would take nothing.

The difference between a devise to A for life, with remainder in fee to his children, and a devise to A for life, with remainder in fee to the children of the testator, is an important one. In the former case the children of A might take by purchase, but they would take nothing without the will. In the latter case the children of the testator might take the reversion without any devise of it to them.

Here the heirs of the testator take by descent from him, and not from one to whom the life-estate is devised, with remainder over to them; and they take without the aid of any will. And we see no reason for holding, that because the heirs of the testator are described in the will as "children" instead of heirs, they should be held to take by devise rather than by descent.

The real question is, whether they take by descent the same estate that was attempted to be conferred upon them by devise, whether they are called children, or heirs, or however else they may be designated in the will. And this is sustained by authority. In the case of *Hurst v. Earl of Winchelsea*, 1 W. Bl. 187, a case referred to by Chancellor KENT on the subject, a woman devised all her estate, charged with pecuniary legacies, to her son Thomas Herbert, designating him by name, and not as heir; and it was held, after two arguments, that he took as heir, and that the devise gave him no estate at all.

In the case of *Medley v. Williams*, 7 Gill & J. 61, the testator, after making some other dispositions in his will, gives and bequeathes all the rest, and residue of his estate, both real and personal, to his daughter M. J. Williams, to her, and heirs forever," without mentioning her as his heir. It was held that M. J. Williams took by descent and not by devise.

So, also, in the case of *Hoover's Lessee v. Gregory*, 10 Yerg. 444, a testator had bequeathed certain property to his daughter by name, and to her heirs, not designating her as his heir; and it was also held that she took by descent and not by purchase.

From these considerations, we are clear that the devise over to

the children of the testator is void, and that the case presented arises between the heir of the testator as such, and the devisee, Mary Steely, untrammelled with the supposed rights of any devise over, after the termination of the estate devised to Mary Steely, and freed from any of the circumstances that have led to the conversion of a condition into a conditional limitation.

If the testator had devised the property to his wife, "during her widowhood," the words "during her widowhood" would have been words of limitation and not of condition, and would have set bounds to the estate devised, not cut down by any condition. *Harmon v. Brown*, 58 Ind. 207.

But such is not the language of the will. The words of the will, "to be hers during her natural life or widowhood," clearly import a condition in restraint of marriage, and the law renders that condition void, leaving the devise for life valid. The words "to be hers during her natural life" precede the conditional words, and limit the estate devised to the life of the devisee. They are clearly words of limitation, and they show an intent on the part of the testator that the devisee should hold for life unless the term should be cut down by what followed. Then follow the words "or widowhood." These latter words signify that if the devisee should cease to be a widow the life-estate thus devised should also cease.

The word "condition" is not necessary to the creation of a condition. Any words that convey the proper meaning will create a condition.

The testator, to be sure, did not say "to be hers during her natural life, on condition that she shall continue to be a widow," but he said what signifies the same thing.

A condition is a condition, call it by what name we will. It is still a condition, though found in the specious and delusive guise of a limitation.

The faculty of speech, it may be assumed, was bestowed upon man to enable him to express, not to conceal, his ideas. The idea, the meaning of an instrument, is to be sought after, whatever may be the form of expression; and when found, it will indicate the character of the instrument. Say that the language of the will creates, not a condition, but a conditional limitation, or a limitation upon a limitation, or an alternate limitation, or otherwise disguise its import as plausibly as we may, still the meaning is unmistakable; and that meaning is that the devisee, Mary Steely, is to have the

property devised, "during her natural life," only on the condition subsequent that she should continue to be a widow. This subsequent condition is void, as before observed and the devise for life valid, though the devisee has since married.

The view which we have taken of the will, in construing the words "or widowhood," as importing a condition, rather than a conditional limitation, is not supported by all the authorities; yet it is sustained by authority, and in our opinion, is correct on principle. We will notice some of the authorities cited upon the point.

The case of *Marples v. Bainbridge*, 1 Madd. 317, was this: Thomas Marples bequeathed to his wife, Anne Marples, "should she survive and continue unmarried, all his goods, chattels, estate, and effects at the time of his death, to use, occupy, and possess the same during the term of her natural life, and from and immediately after her death," he disposed of the same. Anne Marples, having survived the testator, again married, and the question arose whether by such marriage she had not forfeited her right to the property thus devised to her. The vice-chancellor, after stating the case, said: "The cases are numerous on this subject. When there is a bequest, like the present, of personal property, upon a condition subsequent, and no bequest over on breach of the condition, the condition is considered only *in terrorem*. It has been argued, that this is not a condition, but a bequest till the second marriage; but that is too refined a distinction; nor will the court feel disposed to put such a construction on the will, as will occasion a forfeiture. The language imports a condition, just as much as if the words used, were, *if*, or *provided*, she continue unmarried. It must be considered as a condition subsequent. The testator's wife, therefore, is entitled to this property during her life," etc.

The above case is probably not now regarded as law in England, for the reason that it is now there held, as we have seen, that a husband may, as a condition to the bounty he may bestow upon his wife by his will, impose restraint upon her subsequent marriage. But with such a statute as ours, the decision would be entirely correct; and it is in point here in reference to the conditional character of the will.

In the case of *Binnorman v. Weaver*, 8 Md. 517, it was held that a devise that "my wife shall keep possession of all my property during the continuance of her life, provided she doth stay unmar-

ried," without any bequest over in the event of marriage, gave the wife the property for life, the condition in restraint of marriage being void as against the policy of the law.

It may be observed that the condition in the above case, though perhaps more apparent, was no more real than that in the case under consideration.

In the case of *Coppage v. Alexander's Heirs*, 2 B. Monr. 313, the testator left a will, saying "I give unto my beloved wife, Mary Alexander, the half of my land I now own, *during her widowhood or life*," etc. The court said, among other things: "We are aware that it has been sometimes decided that a condition in the bequest or devise of a husband, in restraint of the second marriage of his widow, is, as in other cases where there is no devise over, to be construed *in terrorem*, against the policy of the law and void." Some authorities are cited, and the court proceeds: "Yet it has been frequently said, and we incline to think upon good reason, that a condition that a widow shall not marry is not unlawful or void," etc. After discussing the point at some length, the court finally waives it, and decides that the words of the will are words of limitation and not words of condition, and that the estate devised to the widow terminated at her subsequent marriage. The case is not entirely parallel with the one before us, for the words "during her widowhood" precede the words "or life."

To what extent, if any, the difference in the two cases is substantial, we deem it unnecessary to inquire.

The counsel for the appellant have cited some cases from Missouri, which we will briefly notice. They are *Walsh v. Mathews*, 11 Mo. 131; *Williams v. Cowden*, 13 id. 211; and *Dumey v. Schaeffer*, 24 id. 170.

In the first mentioned of these cases, one Joseph W. Walsh had made a will devising certain property to his wife for and during her natural life or widowhood. This language, it will be seen, is almost identical with that in the will under consideration. The testator having died, and his widow having again married, the question arose whether her estate had not terminated, and the court held that it had. In the opinion the court enter into a full discussion of the question whether a condition in restraint of marriage, annexed to a devise by a husband to his wife, can be upheld, and decide that it can. Indeed, such seems to be the general current of the decisions, where the matter is not controlled by statute. It

is upon this ground that the case seems to have been mainly decided. But the court gave a construction to the words of the will holding them to be words of limitation. In the opinion, it is said, after quoting and paraphrasing the language of the will: "Here then is a limitation on a limitation. The first clause of the sentence limits the estate to the natural life of the wife. The latter clause imposes a limitation on the former, and determines the estate upon the happening of a contingency which the testator foresaw might take place, to wit: the remarriage of his wife. If she did not remarry, then she was to enjoy a life-estate; if she did, her remarriage determined her estate in the house and farm. During her widowhood she takes and holds under the first clause, the second being inoperative; but upon her second marriage, force and effect is imparted to the latter clause and her estate is determined thereby."

It seems too, that the very statement of the court shows that the words of the latter clause import a condition rather than a limitation. "If she did not remarry, then she was to enjoy a life-estate." What is this but saying she was to enjoy a life-estate, if, or upon condition, that she did not remarry? That the words were regarded by the same court as words of condition, will be noticed hereafter, in this opinion.

In the next case, that of *Williams v. Cowden*, *supra*, the testator had devised certain real estate to his son and daughter, in equal moieties, with a provision that if the daughter should marry or die, the land should belong to the son exclusively. The daughter having married, the question arose whether the moiety devised to her went over to the son or remained in her; and the court held that it remained in her, the condition in restraint of her marriage being void.

In *Dumey v. Schaffler*, *supra*, the last of the Missouri cases, one Henneger had made a will containing the following clause: "I give and bequeath unto my wife Sarah the whole of my estate, both personal and real, during her life or widowhood; but if my wife should again marry, so soon as the same takes place, my whole estate, both real and personal, I give and bequeath to John and Sarah Dumey, a boy and girl living with me, to be equally divided among them."

The widow of the testator having remarried, the question arose

whether her right in the property devised had not terminated. The opinion of the court commences as follows:

"*Walsh v. Mathews and Wife*, 11 Mo. 134, determined here in 1847, is a direct authority in point, and must control our present judgment. That case is not shaken by the subsequent case of *Williams and Williams v. Cowden*, 13 Mo. 211, from which it is clearly distinguishable. The first is a condition annexed by a husband to restrain the marriage of his widow, and the second by a father in restraint of the marriage of his daughter. Both were annexed to testamentary dispositions of real property; and the first was allowed, and the second declared to be unlawful as being against public policy; and although the point is settled by the previous judgment of this court, yet as the matter has been argued somewhat at large, we have re-examined the question and are entirely satisfied with the first decision."

Here is a clear and definite recognition of the fact that the will in the case of *Walsh v. Mathews* contained a condition in restraint of marriage. The court then proceed to re-examine at length the validity of such condition in respect to the widow of the testator, and reaffirm its validity.

On the whole, the Missouri cases tend strongly to support, rather than to militate against, the conclusion at which we have arrived in respect to the conditional character of the devise in question.

The cases of *Heath v. Lewis*, 3 De G., M. & G. 954, and *Evans v. Rosser*, 2 Hem. & M. 190, have been cited. In the last-mentioned case, a devise had been made, by which, as construed by the court, "the plaintiff is to take during his life or until his second marriage." The plaintiff having married a second time, it was held that his estate terminated. It may be observed that there was a valid limitation over, upon the second marriage of the plaintiff.

The vice-chancellor said, among other things: "In *Heath v. Lewes* the gift was to a lady for life, if she should so long continue unmarried, and it was held that it was a limitation until marriage, and not a gift defeasible on subsequent condition, and so in all cases where you do not find the words of the precise kind which would import a strict condition, you are able to escape the difficulties which have sometimes been the occasion of embarrassment. The whole difficulty, of course, arises from the refined distinction that limitations until marriage may be good, where limitations defeasible on marriage would be bad.

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"I should have taken more time to consider my judgment if on the point of contention I had held this to be a condition subsequent defeating the estate. But I read it as a gift whose duration depends on two alternatives, and that being the nature of the limitation, it is perfectly good, and in the event that has happened the plaintiff's interest is determined."

The assumption in the foregoing extract, that "words of the precise kind which would import a strict condition" are necessary to create a condition, seems to us to be contrary to the general current of authority in this State and elsewhere. Thus in *Lindsey v. Lindsey*, 45 Ind. 552, 561, this court said, quoting from Williams on Executors: "No precise form of words is necessary in order to create conditions in wills; but whenever it clearly appears that it was the testator's intent to make a condition, that intent shall be carried into effect," and a number of additional authorities are added.

When the condition is created by the will, the question whether it is valid and effectual or not must depend upon the law applicable to the case, and not upon the intention or purpose of the testator.

Other authorities are cited by counsel for the appellant, in reference to the construction of the will, which, in view of the length to which this opinion has already extended, we deem it unnecessary to notice herein. We are satisfied that the will embodies a clear condition in restraint of the marriage of Mary Steely, though clothed in the form of a limitation upon a limitation or an alternate limitation. To hold that the restraint thus imposed upon the marriage of the devisee is valid, and that in order to the enjoyment of the estate devised to her for life, she must remain a widow, would be a palpable evasion of the statute, and a thwarting of the purpose of the legislature in enacting it.

We desire to say, before closing this opinion, that we do not decide that a different conclusion would have been reached had there been a devise over after the marriage of Mary Steely. It will be time to decide such question when it shall arise. We have found the case to be one where there was no valid devise over, and have considered it accordingly.

The demurrer to the complaint was properly sustained.

The judgment below is affirmed, with costs.

Petition for a rehearing overruled.

Stilwell v. Knapper.

NOTE BY THE REPORTER.—In *Coon v. Beas*, 69 Ind. 474, a testator devised to his wife "in lieu of her interest in his lands," a certain tract of land "during her natural life, or so long as she may remain my widow." Held, a life-estate, the condition being void as in restraint of marriage. The court said: "We have no doubt that she took a life-estate. Her subsequent marriage, therefore, did not terminate the estate vested in her. It is very clear that the testator intended that she should have a life-estate unless she should marry again. By the will a life-estate is first given, and then this is attempted to be conditionally cut down, in the same sentence, by the alternative words 'or so long as she may remain my widow.' If he had given her the estate simply as long as she might remain his widow, the case would have been like that of *Harmen v. Brown*, 58 Ind. 207. But the principles settled in that case clearly established the proposition, that having first given her the life-estate, the testator could not cut it down by a condition in restraint of marriage. The condition may not be expressed in terms in the will, but is contained in it as fully as if the language had been 'during her natural life provided she shall not again marry.'"

CASES
IN THE
SUPREME COURT
OF
IOWA.

HART V. WILLS.

(28 Iowa, 56.)

Negotiable instrument — place of contract.

A note dated in one State and signed by one maker there, but signed by other makers and delivered in another State, is a contract of the latter State.

ACTION on a promissory note. The opinion states the facts. The plaintiff had judgment below.

Warner & Bullock, for appellants.

Harvey & Young, for appellee.

DAY, J. The court, we think, erred in holding that the contract upon which the note was executed was to be performed in Missouri, and that the law of Missouri was the *lex loci contractus*. The evidence shows the following state of facts: The note in question was given for money borrowed in equal sums by Uriah Wills and S. Sprague. A. T. Grimes is a surety upon the note. The defend-

ants Wills and Sprague had some conference in Iowa with the plaintiff, Buton Hart, respecting Wm. M. Hart, who lived in Missouri. Subsequently the defendants Sprague and Buton Hart visited Wm. M. Hart in Missouri, where the note in question was signed by Sprague. Wm. M. Hart then gave Buton Hart a package of money to bring to Iowa, and directed him, when the note was executed by the other parties, to pay the money to the defendants. Wills and Grimes signed the note in Decatur county, Iowa, and then the note was delivered and the money was paid over. Under these circumstances the note must be regarded as an Iowa contract, and governed by its laws. In 2 Pars. on Notes and Bills, p. 327, it is said: "The *lex loci contractus* depends not upon the place where the note or bill is made, drawn, or dated, but upon the place where it is delivered from drawer to drawee, from promisor to payee, from indorser to indorsee. It has been frequently stated that a note is nothing until delivered; and that indorsement is not merely writing, but transferring from the hand of the one party to that of the other." See, also, cases cited in note *z*. It is urged by appellee that if no place be designated in a note as a place of payment, the law of the place where it is made determines its construction, obligation and place of payment, citing 2 Pars. on Notes and Bills, p. 333. This is true if the making of a note be regarded as including the delivery, but not otherwise. The appellee further insists that the dating of the note at Princeton, Missouri, designates that place as the place of payment. No authority is cited in support of this position, and we think it is not maintainable. In *Cook v. Moffat*, 5 How. 295, notes drawn and dated at Baltimore, but delivered in New York in payment of goods purchased there, were held to be payable in and governed by the laws of New York. In that case GRIER, J., said: "Although the notes purport to have been made in Baltimore, they were delivered in New York in payment of goods furnished there, and of course were payable there, and governed by the laws of that place." See, also, other authorities cited in 2 Pars. on Notes and Bills, p. 327, note *z*. The court erred in holding that the defense of usury could not be considered. The cause must be remanded for a new trial.

Judgment reversed, and cause remanded.

GOLDEN V. NEWBRAND.

(22 Iowa, 59.)

Master and servant — liability of master for servant's criminal trespass.

An armed watchman, employed by the owners of a brewery to guard their property and preserve the peace, pursued a person acting on the premises in a drunken and disorderly manner, and while he was retreating, killed him. *Held*, that the employers were not liable.

ACTION of damages for maliciously killing of a person. The opinion states the facts. The defendants had judgment below.

Williams & McMillen, for appellant.

John F. Lacey, for appellees.

SEEVERS, J. [Omitting an unimportant matter.]

II. Using the language of appellant's counsel, the following facts were established: "That the defendants, ever since 1876, have been owning and operating a brewery in the city of Oskaloosa, Iowa, under the firm name and style of Blattner & Newbrand, and that Charles Blattner, during all that time, has been and is now their superintendent, managing and running the business, and that one Max Roenspeiss during all that time has been and is now a hand employed in the business there under the control of Charles Blattner, and paid his wages by him out of the firm moneys, and that a part of his business was to guard the brewery, and he slept there at night for that purpose, and that there was a revolver kept there by the firm, and Roenspeiss had access to it and slept with it under his pillow at night; that defendants were engaged in the business of manufacturing and selling beer, and like all beer saloons, rows were likely to occur, and Roenspeiss was empowered to protect the property and to quell disturbances, and worked there in the business generally.

"In the afternoon of the day David Golden was killed, he and his brother were there drinking beer, and got kicked out of the brewery. Afterward, about supper time, they went back to the brewery and drank some more beer, and being a little drunk, mad and crazy, John Golden got into a little fracas with John Mackey,

and they skirmished until they got out of the brewery. In the meantime Max Roenspeiss came out of the office, where the revolver was kept, and approached the east door, and just about that time David Golden, being out of doors on the east side of the brewery, threw a brick into the brewery, and hit the copper cooler, and Roenspeiss started out at the east door after him, and Dave turned and ran, when Roenspeiss, after going fifteen or twenty feet from the brewery, fired and shot Dave in the back of the head, and he fell forward on his face, about forty or fifty feet from the brewery."

Conceding the evidence was as above stated, it did not, in our opinion, show that defendants were liable. It was therefore immaterial, and was properly excluded. The theory of appellant is that Roenspeiss was employed to guard and protect the brewery, for which purpose he was furnished with a pistol, and that he shot the deceased while in the line of his duty. Without determining whether if this was all, the defendants would be liable, we think the fact that the deceased was retreating from the brewery, at the time the fatal shot was fired, shows conclusively it was not fired for or with the intent of protecting the brewery, or in the line of Roenspeiss' duty. If Roenspeiss had shot with the pistol from the brewery a person peaceably passing along the highway, the defendants clearly would not have been liable, and we think there is no essential difference between the case supposed and the one at bar. To protect the brewery did not require Roenspeiss to shoot and kill a person who was retreating therefrom. The killing was not, therefore, done in the line of the duty Roenspeiss was employed to perform.

[Omitting a point of evidence.]

Judgment affirmed.

STATE V. WHITCOMB

(82 Iowa, 85.)

Criminal law — adultery — void divorce — good faith.

A decree of divorce, subsequently adjudged void, is no defense to an indictment for adultery by means of a second marriage, contracted in reliance upon the validity of the decree.*

* To same effect *Fox v. State* (3 Tex. Ct. App. 329), 30 Am. Rep. 144.

CONVICTION of adultery. The opinion states the case.

A. F. Brown and *A. T. Cole*, for appellant.

J. F. McJunkin, attorney-general, for State.

BECK, C. J. I. The evidence tended to prove that defendant and Roana Whitcomb were married in 1855, and that defendant prosecuted an action for a divorce in the District Court of Floyd county, resulting in a decree divorcing the parties, December 4, 1872. On the 7th day of January, 1873, defendant was married to Rachel Patterson, with whom the crime of adultery is charged to have been committed. November 13, 1873, Roana Whitcomb filed a petition in the Floyd District Court to set aside and annul the decree of divorce on the ground that it was procured by the fraud of defendant. The venue of this case was changed to Chickasaw county, and the decree of divorce was by proper decree, upon a trial, set aside and declared void on account of the fraud of defendant practiced in procuring it. The cause was brought upon appeal to this court, and the judgment of the District Court was here affirmed. See 46 Iowa, 437.

The evidence introduced establishes the marriage of defendant and Roana. The defendant relied upon the divorce obtained by him as a defense to the indictment. The court instructed the jury as to this defense, in the following language :

"7. The defendant has offered in evidence a decree of divorce granted to him by the court in Floyd county, and to rebut this the State has introduced in evidence a further decree in that case rendered by the court of Chickasaw county, which adjudges that the decree rendered by the court of Floyd county was without jurisdiction and was obtained by the fraud of this defendant perpetrated in that case. The effect of the judgment and decree in the District Court of Chickasaw county is to set aside the decree rendered in Floyd county and after the judgment was entered in the case in Chickasaw county, the other decree was no longer of any validity and is no defense for the defendant for any unlawful act of his committed since that time; and if you find that the defendant and Roana were lawfully married to each other and that the defendant has, within the eighteen months prior to the 5th day of October, 1877, had sexual intercourse with the woman Rachel described in

the indictment, he would be guilty of adultery and the decree in the court in Floyd county would be no defense."

This instruction is complained of as erroneous. We think it correct. The decree of divorce was set aside for the fraud of defendant in procuring it and for want of jurisdiction of the court rendering it. The questions of fraud and want of jurisdiction were adjudicated in the final proceedings which resulted in setting aside the decree for divorce; that adjudication is a verity which cannot be questioned in this case. It declares that the divorce is, and was from the beginning, void. A void judgment has no effect, is nowhere binding, and nothing can be based thereon; it will support no claim of right and give protection for no act. This doctrine is familiar and does not demand the support of authorities. The decree of divorce therefore did not affect the marriage existing between Roana and defendant; that marriage still exists and existed every moment of time from its celebration to the present. It follows that defendant's pretended marriage with Rachel was no marriage, and that his cohabitation with her was adulterous.

II. Counsel for defendant argue that the decree of divorce possessed some validity until the affirmance in this court of the decree setting it aside. But it must be remembered that the divorce was void from the beginning, the decree setting it aside did not render it void; its invalidity resulted from fraud of defendant and the want of jurisdiction of the court, and the decree annulling it simply declared its invalidity. *Vinsant v. Vinsant*, 47 Iowa, 594, cited by counsel, is not applicable to the point under consideration.

III. The court rejected evidence offered by defendant to show that he acted in good faith in obtaining the divorce and in marrying Rachel, and that he believed the decree of divorce to be regular and sufficient. The evidence was rightly rejected: The decree of the court setting aside the divorce, as we have said, must be regarded as a verity and conclusive as to defendant. He cannot now question it, and therefore cannot show that for any reason the divorce is valid.

If defendant, in good faith, supposed he was legally authorized to marry Rachel, such belief did not have the effect to make valid the proceedings which were void on account of his fraud. His belief as to his rights under the decree had no effect to establish such rights. It has been held that a prisoner's erroneous belief that she had been legally divorced was no defense to an indictment for

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adultery. *State v. Goodenow*, 65 Me. 30. See, also, as bearing upon this point, *Com. v. Elwell*, 2 Metc. 190; *Com. v. Mash*, 7 id. 472.

[Omitting a minor point.]

We reach the conclusion that the proceedings and rulings of the court below are correct. The judgment is therefore affirmed.

Judgment affirmed.

FEJAVARY V. BROESCH.

(38 Iowa, 88.)

Exemption from execution — waived by lien in lease.

A provision in a lease that the rent charge shall be a lien on the crops and stock on the leasehold, "whether exempt from execution or not," is valid as a mortgage of the exempt property.

PROCEEDING to discharge a levy for rent. The defendant leased premises of the plaintiff, covenanting that the rent charges should be a lien on the crops and stock on the premises, "whether exempt from execution or not." The sheriff levied on exempt property. The levy was discharged by the court below.

Geo. E. Hubbell and Brannan & Jayne, for appellant.

SZEEVERS, J. It has been held that the waiver of the benefit of the exemption laws in a promissory note was against public policy and void. *Curtis v. O'Brien*, 20 Iowa, 376.* Does the case at bar come within the rule established in that case? We think not. In the cited case the contract was executory, and this court refused to enforce it because such a waiver is not recognized by statute and was against public policy. But the statute does recognize the validity of a mortgage on property which is exempt from execution. The validity of such a mortgage has never been doubted. Nor is it material that the property mortgaged was not in existence at the time it was executed. Whatever doubts there may have been on this subject were settled in this State in *Scharfenburg v. Bishop*, 35 Iowa, 60. The same principle was recognized in *Brown v. Allen*, id. 306.

* Contra, *Brown v. Lettick*, 60 Ala. 313; s. c., 31 Am. Rep. 42. and note. 44.

Technically, it is said, the instrument in this case cannot be regarded as a mortgage, because it does not contain a grant or conveyance of the property. But clearly it creates a lien or equitable charge, and the right of a party to execute it, and its validity, must depend on the same principle as a mortgage. What does it matter what this instrument is called? the substantial right created is the same as a mortgage. Why may not the one be executed as well as the other? The validity of the lien should be recognized in the one case as in the other. Both may be executed by a party capable of contracting on a sufficient consideration and for a lawful purpose.

There is no essential difference between a mortgage and the instrument in question, unless it be in the mode of enforcement; but this does not touch or affect the question of power or validity of either instrument when executed. Such instruments as that in the present case have been upheld in *Everman v. Robb*, 52 Mis. 653; s. c., 24 Am. Rep. 682; *McCaffrey v. Woodin*, 65 N. Y. 459; s. c., 23 Am. Rep. 644, and *Butt v. Ellett*, 19 Wall. 544.

The motion to discharge the property was not based on the ground that the plaintiff had not proceeded in the proper manner. It cannot be made here for the first time. We must not be understood as intimating it would have prevailed if the objection had been made below.

Judgment reversed.

WADE V. CLARK.

(68 Iowa, 156.)

Bankruptcy—discharge—fiduciary debt—merger in judgment.

A debt created while acting in a fiduciary character is not discharged in bankruptcy, although merged in a judgment.

ACTION on a judgment. Plea of discharge in bankruptcy. The opinion states the point. The plaintiff had judgment below.

Bryan & Bryan, for appellant.

Phillips & Conrad and *W. C. Hillis*, for appellee.

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ADAMS, J. The plaintiff relies upon section 33 of the bankrupt act to avoid the effect of the discharge. That section is in these words: "No debt created by fraud * * * or while acting in a fiduciary character shall be discharged by the proceedings in bankruptcy." It is contended, however, by the defendant that the debt is discharged notwithstanding the provision above quoted. His claim is based upon the fact that judgment was taken upon the debt.

That this would have the effect to merge the original cause of action no one would deny; that such merger would prevent all inquiry into the original cause of action seems to have been held substantially in *Ridge v. Breck*, 10 Cush. 43; *Bangs v. Watson*, 9 Gray, 211; *Wolcott v. Hodges*, 15 id. 547; *Coleman v. Davies*, 45 Ga. 489. The latter case arose under the act in question. The Federal courts, however, sitting in bankruptcy, appear to have given a different construction to the act, holding that the merger of the original cause of action would not have the effect to bring the debt within the operation of the discharge. *In re Patterson*, 1 Nat. Bank. Reg. 307; *In re Whitehouse*, 4 id. 63; *Warner v. Cronkite*, 13 id. 52; *Flanagan v. Pearson*, 14 id. 87; *In re Seymour*, 1 Ben. 348; *In re Robinson*, 6 Blatchf. 253. The same rule was held in State courts in *Howland v. Carson*, 28 Ohio St. 625; *Homer v. Spelman*, 78 Ill. 207; *Reid v. Martin*, 11 Sup. Ct. (N. Y.) 590. Such appears to us to be the correct rule. The debt in question was not, we think, within the meaning of the statute, *created* when the judgment was rendered. The most that can be said is that that particular form of the debt was then created. In our opinion the debt, within the meaning of the statute, was created while the defendant was acting in a fiduciary character, and is therefore not discharged.

The judgment of the court below is affirmed.

Judgment affirmed.

DENTON V. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD CO.

(22 Iowa, 161.)

Negligence — warehouseman — burden of proof.

In an action against a warehouseman for the loss of goods by fire, alleged to have been occasioned by his negligence, the burden of proof is on the plaintiff to show such negligence *

* To same effect, *Clafin v. Meyer* (75 N. Y. 260), 31 Am. Rep. 487.

Denton v. Chicago, Rock Island and Pacific Railroad Company.

ACTION for value of goods lost by negligence. The opinion states the case. The defendant had judgment below.

Sapp, Lyman & Ament, for appellant.

Rising, Wright & Baldwin, for appellee.

SEEVERS, J. The petition states that the defendant received for transportation to plaintiff, at Avoca, certain goods and merchandise; "that notwithstanding its duty in that behalf, defendant failed to transport, keep, and deliver to the plaintiff said goods and merchandise at said Avoca; that defendant utterly failed and refused to do so, though the same had been demanded, but had, by its own negligence, and without fault on the part of the plaintiff, allowed the same to be destroyed by fire."

The defendant denied all the allegations in the petition not admitted in the answer, and then averred that the goods were in its possession at Avoca on the 7th day of October, 1875, and the same not being called for they were on the 9th of said month placed in a suitable warehouse and carefully stored therein, and were destroyed by fire on the 11th day of said month, without the fault or negligence of defendant.

A general verdict was found for the defendant, and there was a special finding, as follows:

"1. Do you find that the goods mentioned in plaintiff's petition were shipped by him at Manchester, Iowa, to be transported to Avoca, Iowa? Ans. Yes.

"2. Do you find that said goods were destroyed by fire or in any other manner before they reached their destination? Ans. No.

"3. Do you find the said goods were received by the defendant at its station in Avoca, Iowa? Ans. Yes.

"4. Do you find that said goods were placed in the defendant's freight house at Avoca, Iowa, and were burned when in said freight house? Ans. Yes."

[Omitting minor matters.]

The court in substance instructed the jury that the burden of proof was on the plaintiff. That is, before the plaintiff could recover he must establish to the satisfaction of the jury that the destruction of the goods was caused by the negligence of the defendant.

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It may be the plaintiff might have contented himself with averring the delivery of the goods, a demand and refusal, and that when he established the truth of such pleading he would have been entitled to recover.

It is said by counsel there is a conflict in the authorities on this question. That there is an apparent conflict, at least, must be admitted.

We have held, in a case involving, perhaps, a similar principle, that the burden was on the plaintiff. *Gandy v. C. N. & W. R. Co.* 30 Iowa, 430.

That, however, was an action sounding in tort. This is based on contract, and we are not prepared to say there may not be a distinction between these cases caused by this fact. We are not aware that the precise question in this case has been decided by this court, and because of the apparent or real conflict in the authorities we do not do so now, because it is unnecessary. But as the destruction of the goods by fire was admitted in the pleadings, did or did not this fact shift the burden of proof, conceding that, but for this admission, it would have been on the defendant? *Mitchell v. U. S. Express Co.*, 46 Iowa, 214; *Clark v. Barnwell*, 12 How. 272.

The contract of transportation was at an end before the goods were destroyed. The liability, therefore, of the defendant was that of a warehouseman.

That the destruction of goods by a fire which is purely accidental constitutes a good defense as to a warehouseman is conceded on all hands. Counsel do not claim otherwise. The substance of the allegation in the petition is that the goods were destroyed by fire, and that such fire was caused by the negligence of the defendant.

When the destruction by fire is conceded, the goods are accounted for. But the plaintiff asserts, not sufficiently, because he will establish on the trial the fire was caused by the negligence of the defendant. This cannot be said to have been an immaterial allegation, and therefore unnecessary to be proved. One of two things is undoubtedly true: either that the defendant to defeat a recovery must establish that the fire was accidental, or the plaintiff must prove it was caused by negligence in order to recover.

Now the plaintiff, for satisfactory reasons it must be presumed, and there may be many such, assumed the burden of proving negligence. The defendant clearly, we think, had the right to so con-

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clude, and prepare its defense accordingly. That is, to rebut the case made by the plaintiff.

It would be unjust, under this record, for the plaintiff to prove simply the receipt of the goods, a demand and refusal, then rest and say to the defendant: no matter if I have said I would prove the fire was caused by your negligence, I now, at this late day, demand that you should assume the burden and prove that the fire was accidental.

The defendant might well be surprised at such a demand, and had the plaintiff taken this course the defendant would undoubtedly have been entitled to a continuance, or time to procure and present the required evidence. This, however, was not done. The plaintiff introduced no evidence tending to establish negligence, and did not say to the court or defendant that he intended to, and should insist that the burden was on the defendant, notwithstanding the allegations in his petition, but submitted the cause to the jury. Under these circumstances the court rightly held the burden was on the plaintiff.

Judgment affirmed.

HANGER V. CITY OF DES MOINES.

(88 Iowa, 128.)

Municipal corporation — power to offer reward.

In the absence of express authority a city has no power to offer a reward for the detection of a criminal.

ACTION for a reward offered by the mayor, under a resolution of the common council of Des Moines, for the detection of a murderer. The opinion states other facts. The defendant had judgment below.

Maxwell & Witter, for appellant.

Bryan & Bryan, for appellee.

ROTHROCK, J. In *Hawk v. Marion County*, 48 Iowa, 472, it was held that a county has no power or authority to offer a reward for the arrest and conviction of a criminal, because there is no statute

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in this State which expressly or by necessary implication imposes upon counties any duty in respect to the arrest of persons charged with crime.

It is well settled that a municipal corporation can exercise only such powers as are expressly granted by statute, and such as are necessarily and fairly implied in, or incident to, those conferred by express grant and "those essential to the declared object and purposes of the corporation." 1 Dill. on Mun. Corp., § 55.

Tested by this, we think the court below correctly held that the defendant was not bound by the resolution of the council and the proclamation of the mayor.

It is not claimed that there is any express statutory authority authorizing the offer of the reward, but that the law imposes a duty upon cities to arrest and procure the conviction of criminals. No statute imposes such duty in express terms. That cities may pass such ordinances as shall be necessary and proper to provide for the safety of the inhabitants, and preserve peace and order therein, is provided by statute, but we do not believe that the offering of rewards for the detection of criminals is necessarily and fairly implied in this general grant of power, nor that it is essential to any declared purpose of the corporation. If it were doubtful it would be the duty of the courts to deny the power. "Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied." 1 Dill. on Mun. Corp., § 55.

Judgment affirmed.

SMALLEY V. GREENE.

(53 Iowa, 241.)

Attorney — public policy — restraint of trade — statute of frauds — time of performance.

An agreement by an attorney to turn over to another attorney notes which he holds for collection is invalid.

An agreement not to practice law in a particular town is valid. (*See note, p. 269.*) The provision of the statute of frauds respecting contracts not to be performed within a year applies only to those not to be so performed on either side.

ACTION for breach of oral agreement to sell a law business, including demands held for collection, and not to practice law in the same town. The defendant had judgment on demurrer.

A. R. Smalley and M. H. Baugh, for appellant.

T. R. North, G. W. Clark, and White & Woodin, for appellee.

DAY, J. I. The judgment of the court does not show upon what ground the demurrer was sustained. We think no damages can be recovered on account of the neglect of the defendant to turn over to the plaintiff the \$4,500 of notes which the defendant had in his hands for collection. It is presumed that the defendant's clients selected him for the collection of these notes because they reposed confidence in his capacity and integrity, or for some reason desired him, in preference to all persons else, to perform this service. The defendant had no right to substitute another for the performance of a duty which he had agreed to discharge himself, and he could not, without the consent of his clients, bind them to accept the plaintiff to perform this service. If the notes had been turned over to the plaintiff by defendant, his clients could immediately have demanded and compelled their surrender. The plaintiff must have known that in this part of the agreement the defendant undertook to do what he had no legal right to perform. For a breach of this part of the agreement damages are not recoverable.

II. Appellee insists that defendant's agreement not to engage again in the practice of law in Adel is against public policy and void. The defendant did not agree generally not to engage in the practice of law, but simply not to engage in the practice of the law at Adel. A contract in restraint of trade as to particular places is valid. *Hedge v. Lowe*, 47 Iowa, 137, and cases cited; *Jenkins v. Temples*, 39 Ga. 655; *Chappel v. Brockway*, 21 Wend. 157. In *Holbrook v. Waters*, 9 How. Pr. 335, it was held that an agreement upon sufficient consideration not to practice medicine, nor in any manner to do business as a physician in the county of Oswego, at any time after the first day of May, 1851, was valid. In *Bunn v. Guy*, 4 East, 190, a contract entered into by a practicing attorney to relinquish his business and recommend his clients to two other attorneys for a valuable consideration, and that he would not himself practice in such business within one hundred and fifty miles of

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London, was held to be valid. See, also, *Heichew v. Hamilton*, 3 G. Greene, 596; s. c., 4 id. 317.

III. The point raised in the demurrer that the contract could not be performed within a year is not argued by counsel. The petition alleges performance of the agreement on the part of the plaintiff. In *Cheny v. Hemming*, 4 Exch. 631, it was held that the provision of the statute of frauds respecting contracts not to be performed in a year applies only to contracts not to be performed on either side, and not to a contract performed on one side within the year. See, also, *Donellan v. Road*, 3 B. & Ad. 899; *Riddle v. Backus*, 38 Iowa, 81; *Blair Town Lot and Land Co. v. Walker*, 39 id. 406, and cases cited.

[Omitting an unimportant point.]

In sustaining the demurrer generally, the court erred.

Judgment reversed.

NOTE BY THE REPORTER.—In *Rousillon v. Rousillon*, Ch. Div., the plaintiffs were champagne merchants at Epernay, in France. The defendant, whose name was the same as that of the plaintiffs, having entered their house and learned the business, acted for two years as their representative in England, and then wrote a letter to them, by which he undertook not to represent any other champagne house for two years after leaving the plaintiffs' employment, and not to establish himself or associate himself with other persons or houses in the champagne trade for ten years after leaving them. Held, that the agreement was valid, as the restriction was not larger than was necessary for the reasonable protection of the plaintiffs. Fry, J., said: "It is said that the contract is not reasonable, and it is unquestionably the law of this country that contracts of this description, being in restraint of the freedom of trade, must be reasonable. Now, what is the criterion by which the reasonableness of contract is to be judged. I will take the law on that point from the judgment of TINDALL, C. J., in delivering the judgment of the Court of Exchequer Chamber, on appeal from the Court of Queen's Bench, in *Hitchcock v. Coker*, 6 A. & E. 438, where he said (p. 454): 'We agree in the general principle adopted by the court, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void.' That passage was adopted by Lord WENSLEYDALE, when a baron of the Court of Exchequer, in delivering judgment in *Ward v. Byrne*, 5 M. & W. 543, 561, and therefore the rule so expressed has the authority of the three common-law courts, the Queen's Bench, the Common Pleas, and the Exchequer. If, therefore, the extent of the restraint is not greater than can possibly be required for the protection of the plaintiffs, it is not unreasonable. Another case which in my view throws great light upon the mode in which this question ought to be approached is *Tullic v. Tullic*, 1 El. & B. 391. There the plaintiff and the defendant had been partners as publishers of books. Part of their trade, called the canvass trade, consisted in publishing books in numbers, and employing travellers to sell such books by canvassing purchasers. The partnership was dissolved, the plaintiff being the continuing partner. The defendant agreed, amongst other things, not directly nor indirectly to be concerned in the canvassing trade in London, or within 150 miles of the General Post-Office, nor in Dublin or Edinburgh, or within fifty miles of either, nor in any town in Great Britain or Ireland in which the plaintiff or his successors might at the time have an establishment, or might have had one within the six months preceding. The action was for a breach of the covenant. It was pleaded, amongst other things, that there were numerous works which the plaintiff did not publish and had no

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intention of publishing, and that many of such works might be published with advantage to the public by the defendant, and without injury to the plaintiff, that the canvassing trade applied to all such books; and that the restraint as to the canvassing trade as applicable to such books was unreasonable. The court upon those pleadings, upon a demurrer, held that the declaration was good, it not appearing that the restraint was unreasonable. And in giving judgment they considered a dictum in *Mitchell v. Reynolds*, 1 P. W. 181, 191, to the effect that: 'Wherever such contract *stat indifferenter*, and for aught appears, may be either good or bad, the law presumes it *prima facie* to be bad.' But instead of adopting that view they called attention to what was said by the Court of Exchequer in *Mallan v. May*, 11 M. & W. 653, 667, that 'it would be better to lay down such a limit as under any circumstances would be sufficient protection to the interest of the contracting party, and that if the limit stipulated for does not exceed that, to pronounce the contract to be valid.' And further on in their judgment they said this: 'Even if the facts therein stated are taken to be admitted by the demurrer, and the reasonableness of the restriction in question is to be considered with reference to those facts, together with the facts alleged in the declaration, still we think the plea bad. For although the books capable of republication may be at most infinite, still the number of subscribers to such republication coming out in numbers is limited; and although if the defendant's books are excluded, it does not follow that the plaintiff's books would be purchased, still we cannot ascertain that the number of subscribers to the plaintiff's books would not be diminished if the defendant competed with him by offering other books, especially if they were of a similar character. And unless the defendant made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed if the defendant's intended publications are excluded, according to the general rule before referred to, we ought not to hold the contract void.' In other words the Court of Queen's Bench threw upon the defendant, who alleged the invalidity of the contract on this ground, the burden of showing that it was plainly and obviously clear that the protection extended, and the proposed exclusion of the defendant's publications was, beyond what the plaintiff's interests required. And such, in my opinion, ought to be the rule of law of this court upon this point, because it is to be borne in mind that the defendant is seeking to put a restraint upon the freedom of contract, and he who does that must, I think, show that it is plainly necessary for the purposes of freedom of trade. In that point of view I adopt the view expressed by the Master of the Rolls, upon the subject of the necessity of courts being careful how they invade the freedom of contract, in *Printing and Numerical Registering Company v. Sampson*, 33 L. T. Rep. (N. S.) 334; L. R., 19 Eq. 462, 465. The question then arises, does the defendant in this case discharge the burden so cast upon him. In answering that I must consider the facts of the case. It appears that at the time this contract was entered into, the defendant had for some two years been acting as the representative of the plaintiffs in England. His instructions appear to have been under their direction to travel over all parts of England and over Scotland, and at a subsequent date, not so far as I know at this date, he visited Holland for the purposes of their trade. Further than that, he had, by a residence of some four months in Epernay, at the house of the principal plaintiff, acquired apparently a knowledge of the plaintiff's trade as carried on in France. He was therefore acquainted with the trade at both its ends. He was a relative of the plaintiffs and bore their name. Looking, therefore, at the extent of trade carried on by the plaintiffs and its diffusion over the whole of England; looking at the facilities which now exist for carrying on trade in various places by means of the freedom of communication which exists between them, I cannot say that it has been made plain and obvious to me that this contract exceeds in its extent that which the plaintiffs were entitled to for the protection of their trade. No doubt criticisms may be made on the contract, and it may be said, as it has been said, that you can conceive cases to which the restraint would apply, in which no injury would be done to the plaintiffs. That observation applies to *Tallis v. Tallis*, 1 E. & B. 391, and when I bear in mind the obvious channels through which trade is influenced, and the great difficulty of providing for every possible case in which injury might arise, without including certain possible cases in which injury might not arise, I have come to the conclusion that it has not been shown to me that this contract is larger than is necessary for the reasonable protection of the plaintiffs, and I hold therefore that that objection fails. But then it is said that over and above the rule

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that the contract shall be reasonable, there exists another rule, viz., that the contract shall be limited in its space, and that this contract, being in its terms unlimited, and therefore extending to the whole of England, meaning England and Wales, must be void. Now, in the first place, let me consider how far such a rule would be reasonable. There are many trades which are carried on all over the kingdom which by their very nature are extensive and widely diffused. There are others which from their nature and necessities are local. If this rule existed it would afford a complete protection to the latter class of trade, whilst it would prohibit complete protection of the former class, and an injury which ought not to be wrought without good reason would arise. In the next place, the rule, if it existed, would apply in two classes of cases. It would apply where the want of limitation of space was unreasonable, and it would apply also where the universality of the contract was reasonable. Now, in the former class of cases, those in which the universality was unreasonable, the rule would operate nothing, because that is already covered by the rule that the contract must be reasonable. It would therefore only operate in cases in which the universality of the prohibition was reasonable, that is to say, it would only operate where it ought not to operate. For the existence of such a rule I should require authority. In the next place, this rule is pressed upon me as an artificial rule, an absolute rule, or what has been called by the late WICKES, V. C., a hard and fast line, or a hard and fast rule. Such a rule may always be evaded by a single exception. No exception to a rule of this description can be said to be colorable, because you can only judge whether the exception be colorable or not by the principle of the rule; but if the rule, as suggested in this case, be really an artificial one, without principle, there is no criterion to tell whether the evasion is colorable or not. It appears to me for these reasons that I ought not to hold such a rule to exist unless it be clearly established. Then how stand the authorities upon the point? There are undoubtedly cases in which it has been said that the restraint must not be universal. Such are the cases of *Warde v. Byrne*, 5 M. & W. 548, and *Hinde v. Gray*, 1 M. & G. 196, but looking at the judgments in those cases, and reading them with a view to the subject-matter, they appear to me to relate only to cases in which the universality is unreasonable, and more than once in *Warde v. Byrne* the rule is so explained, although I candidly admit that you may select other passages in the judgment in which the court seems to say that the universality is of itself an objection to the contract. But undoubtedly WICKES, V. C., of whose judgments I can never speak without the highest respect, came to the conclusion that such an artificial rule existed, and so he expressed himself in the case of *Allsopp v. Wheatcroft*, 27 L. T. Rep. (N. S.) 372; L. R., 15 Eq. 59. He says (p. 64) that 'there has been a natural inclination of the courts to bring within reasonable limits the doctrine as to these covenants laid down in the earlier cases, but it has generally been considered in the latter as well as in the earlier cases, that a covenant not to carry on a lawful trade, unlimited as to space, is on the face of it void. This seems to have been treated as clear law in *Warde v. Byrne*, 5 M. & W. 548, and in *Hinde v. Gray*, 1 M. & G. 196, and in other cases; and the rule, if not obviously just, is at any rate simple, and very convenient. No doubt in the case of *Leather Cloth Company v. Lonsont*, 21 L. T. Rep. (N. S.) 661; L. R., 9 Eq. 345, JAMES, L. J. (then vice-chancellor), threw some doubt on the existence of a hard and fast rule which makes a covenant in restraint of trade invalid if unlimited in area.' There are earlier cases than the one before JAMES, V. C., which seem to me to be inconsistent with the existence of the supposed hard and fast line. In *Whittaker v. Howe*, 8 Beav. 383, the case relating to attorneys, it was stipulated that the business should not be carried on in any part of Great Britain for twenty years; and again in *Jones v. Lees*, 1 H. & N. 129, the covenant was against selling a particular article anywhere in England without the invention of the plaintiff applied to it, and the objection that the covenant was unlimited as to space was taken. 'It is objected,' said BRANWELL, B., 'that the restraint extends to all England, but so does the privilege. The cases with respect to the sale of a good-will do not apply, because the trade which is the subject-matter of the sale is local, and therefore a prohibition against carrying it on beyond that locality would be useless.' In other words the learned judge explains the inclination of the courts against the universality of a prohibition applying only to cases where the subject-matter of the sale was itself local. That is just the view I take of the earlier cases. Still more important are the observations of JAMES, L. J.; in the case of *The Leather Cloth Company v. Lonsont*, 21 L. T. (N. S.) 661; L. R., 9 Eq. 345, where he undoubtedly came to the conclusion that no such rule was laid

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down as has been insisted on before me. Having referred to the cases, he says (p. 358): 'I do not read the cases as having laid down that un rebuttable presumption which was insisted upon with so much power by Mr. Cohen. All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trades are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract.' I have, therefore, upon the authorities, to choose between the two sets of cases; those which recognise and those which refuse to recognise this supposed rule, and for the reason I have already mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognise this rule, and I consider that the cases in which an unlimited prohibition has been spoken of as void, relate only to cases where such a prohibition has been unreasonable." See *Unlaken v. Donnelly*, 45 Cal. 152; a. c., 13 Am. Rep. 172, and note, 173.

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(28 Iowa, 207.)

Contract — to build scale — breach — tender.

The defendant ordered, through the plaintiff's agent, a scale to be built on defendant's premises, but countermanded the order by telegram before it was communicated to the plaintiff. The plaintiff shipped the necessary iron work to defendant, who refused to receive it, and it remained at the railway. *Held*, that no action for the price could be maintained.*

ACTION on the following order delivered to plaintiff's agent, April 4, 1877, at Hampton, Illinois.

"VICTOR SCALE COMPANY: — Please send me from Moline one 4-ton scale and beam box, and one No. 7 Dormant scale with drop lever; 4-ton scale to have double brass beam. Marked to W. G. Beed, Hampton, Iowa, via Ackley, for which I agree to pay one hundred and twenty-seven and fifty one-hundredth dollars when the scale is built, as follows: Cash, \$127.50. And it is agreed that you do not part with nor relinquish your claim on or title to said scale until it is fully paid for, and in default of payment for the scale as agreed, you or your agent may, without process of law, take possession of and remove said scale and collect reasonable charges for the use of same; scale warranted durable and accurate. To be built by Moline Scale Co., soon as possible. If the purchaser delays having scale built thirty days after time set for building then this order shall become due and payable, the same as if the scale

* To same effect, *Butler v. Butler* (77 N. Y. 472, 33 Am. Rep. 642).

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had been built at the time stated. The purchaser agrees to pay freight, furnish lumber; dig the pit, put in foundation, board the builder and take him back to the station. WM. G. BEED."

On the same day the defendant telegraphed to the plaintiff at Moline, Illinois, countermanding the order, and directing that the scale should not be shipped. The plaintiff received the telegram on the same day, and before it had any knowledge that the order had been made. On the 10th of April the plaintiff shipped a set of scales to the defendant which the defendant refused to receive, the same remained at the freight depot at Hampton.

This action was to recover the price of the scale. The defendant had judgment below.

King & Henley, for appellant.

McKinzie & Hemingway, for appellee.

ROTHBROOK, J. At the time the plaintiff received the telegram countermanding the order no act had been done by which the scales in question were set apart as the property of the defendant. The evidence shows that "the scales so far as the iron work could be done were all perfect." By this we understand that the plaintiff had on hand the iron work of scales such as are described in the order. The single question to be determined is, had the plaintiff the right to select the iron work of the scales after the order was countermanded, and by shipping to Hampton, and offering to build them, maintain an action against the defendant, not for the difference between the contract price and the actual value, but for the amount named in the contract as the price to be paid? The plaintiff must recover, if at all, upon the case made in the pleadings, and recovery is sought upon the theory that by shipping the scales, and offering to build them, the plaintiff is entitled to a judgment for the contract price.

We are of the opinion that the action cannot be maintained. It will be observed that the contract was for scales to be "built" by the plaintiff. It is true the plaintiff had on hand the necessary iron work ready to be set up, but this, without more, is not the property named in the order. The iron work was to be shipped and the scales built, that is, the frame and platform were to be constructed, for which defendant was to furnish the lumber. Suppose a person

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should contract with a manufacturer for a wagon to be built, and agree to furnish the iron, and the manufacturer should have all the necessary wood-work on hand ready to be set up and ironed, and before any thing was done the order should be countermanded, we think the manufacturer could not recover the contract price by setting apart the wood-work and calling upon the other party to furnish the iron. This is exactly parallel with the case at bar. Both are contracts with manufacturers to build, or manufacture, an article not yet completed or built. We have been cited to no adjudicated case, and are unable to find any, where it has been held that a vendor can recover the contract price unless the contract be such as to enable him to put the article sold in such condition as to transfer the title of the property to the vendee. What the law aims to do in case of a breach of contract is to make the parties whole, by awarding damages equal to the injury. In this case if the plaintiff should recover the contract price, it will receive more than compensation for the injury. The full contract price would be recovered for the scales without building them.

In *Bement v. Smith*, 15 Wend. 493, the plaintiff built a sulky for the defendant according to an agreement, tendered it to him, and on his refusal to accept it deposited it with a third person on his account, giving the defendant notice of the deposit, and brought an action of assumpsit. It was held that the plaintiff was entitled to recover the contract price. That case is essentially different from the case at bar. The plaintiff had done every act to be done by him to the property, and it was ready for delivery, and was actually tendered. In the case at bar the plaintiff's obligation could not be discharged without building the scales. We think that in all the cases where it is held that the contract price may be recovered it will be found that the article sold was completed and ready for delivery, and a tender made. *Gordon v. Norris*, 49 N. H. 376; *Dustan v. McAndrew*, 44 N. Y. 72. Upon the other hand there are cases which hold that where there is a refusal by the vendee to perform the contract, by receiving the property purchased, the measure of damages is limited to the difference between the contract price and the actual value. *Moody v. Brown*, 34 Me. 107, and authorities there cited; *Allen v. Jarvis*, 20 Conn. 38; *Garrison v. Madigan*, 13 Wis. 67.

We think, from an examination of the authorities cited by counsel, as well as others that have come under our observation, that the

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true rule is that where every thing has been done by the vendor which he is required by his contract to do, and the manufactured property in its completed condition is tendered to the purchaser, and he refuses to receive it, and it is held by the vendor for the purchaser, the vendor may recover the contract price. The result of the judgment in such cases would be to vest in the purchaser the title to the property. But where, as in the case of manufactured articles, something remains to be done by the vendor, which requires the co-operation of the purchaser, and the purchaser refuses to perform, the contract price cannot be recovered. To adopt the contrary rule would allow the vendor to recover for a manufactured article, which is yet incomplete and unfinished, the full price of a finished article, and would be giving him more than his actual damages. We find no case which adopts such a rule.

Judgment affirmed.

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(39 Iowa, 329.)

Master and servant — negligence — action by servant — contributory negligence.

An employee in a coal mine left the room where he was at work, and went to another, according to custom, to visit some other employees there at work, and while there the roof fell in, by reason of the decay and insufficiency of the supports, and killed him. *Held*, that no action could be maintained against the employer therefor.

ACTION of negligence for death of plaintiff's intestate. The opinion states the case. The defendant had judgment below.

B. A. Williams and Smith & Baylies, for appellant.

Barcroft, Given & McCaughan, for appellee.

BECK, C. J. The petition alleges that defendant is the owner of a coal mine, and is engaged in mining coal therein, and that plaintiff's intestate was employed as a miner by defendant. The petition then proceeds to set out the cause of action in the following words:

"That defendant and his superintendent knew that it was the custom of miners in said mine, and had been the custom from the time said mine was opened, when not actively engaged in work, to visit each other in their respective rooms.

"That with full knowledge of such custom defendant acquiesced in it, and thereby invited and permitted them so to do.

"That prior to said 15th of October, 1877, there was a room in said mine that had been, at one time, used by defendant for mining coal, but said room had been unused for about six months prior to said 15th of October, 1877, and during the time of such non-use the supports to the roof of said room had become decayed and weakened, and the rock, slate and dirt composing the roof had become weakened and loosened, so that the same was defective and dangerous, and was well known to be defective and dangerous by defendant and his superintendent, on said 15th of October, 1877.

"That the defective and dangerous condition of said room was entirely unknown to said Samuel Wright.

"That on said 15th of October, and while said room and roof were in the dangerous and unsafe condition aforesaid, the defendant, by his superintendent, carelessly and negligently caused two of defendant's employees to go to work in said room digging coal, and thereby caused said Samuel Wright and other employees to believe that the said room, and the roof thereof, were safe and not dangerous to be used and occupied, and thereby invited and permitted the said Wright and other employees in said mine to go into said room, where two of defendant's employees were at work, as aforesaid, in accordance with their usual and known custom, and without warning the said Wright, in any manner, that the said room was dangerous to be occupied or entered.

"That on said 15th of October, said Samuel Wright was at work for said defendant as a miner, in a room in said mine near to the said defective and dangerous room, when—about 11 o'clock of said day, and being at leisure for a few minutes, and knowing that miners were at work in said room, and not knowing its dangerous condition, and acting upon the aforesaid custom and the acquiescence of defendant, as aforesaid, therein, and relying upon defendant to keep said premises in a safe condition for use, entry and occupancy, as it was his duty to do—he, the said Wright, stepped out of the room where he was at work and into said dangerous room for the purpose of speaking to the men therein employed, and immediately

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after he had entered said room, owing to the dangerous and defective condition of the roof thereof, and the decayed and insufficient supports for the same, as aforesaid, four tons of rock, slate and dirt, composing the roof of said room, fell upon the said Samuel Wright, whereby he was instantly killed.

"That the death of said Wright, as aforesaid, was directly caused by the carelessness and negligence of defendant in permitting said roof to become loosened and weak, the props and supports thereof to become decayed and unsafe, and in causing his servants to occupy and use such room in such dangerous and unsafe condition, and in permitting, and by his conduct and acquiescence inviting, the deceased and others employed in said mine to use, occupy and enter said room, without adopting any rules to prevent them from being exposed to said danger, of which defendant had knowledge, and without warning them or said deceased of such danger."

The demurrer assails the petition on the grounds, among others, that "it shows the deceased was not, at the time of injury, in the line of his duty, in the service or employment of defendant," and "it does not show that defendant was charged with any care or diligence to protect persons visiting said room from danger of injury by the falling of the roof of said room."

In order to establish liability of defendant it must be made to appear that the intestate was in defendant's employment and in the proper discharge of duty, and that he did not voluntarily seek a place of danger. It cannot be claimed that defendant would be liable if the intestate had been a visitor to the mines, or had left his proper place and sought the dangerous room without thereby serving defendant or discharging any duty of his employment. When the accident happened it clearly appears that the intestate was not engaged in mining, which was his employment; that his proper place was not in the room where he was injured, but on the contrary, he was a visitor there for his own pleasure or amusement. The intestate, not being engaged in his employment was in the same position of a visitor to the mine. As an employee, having voluntarily put himself in danger, he cannot recover. *Doggett v. Ill. Cent. R. R. Co.*, 34 Iowa, 284.

The custom of miners to visit their fellow workmen, and the acquiescence of the defendant in such custom, cannot be regarded as an invitation for the workmen to leave their proper places and frequent dangerous parts of the mine at the risk of defendant.

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The allegations of the petition do not present the case of a trap or concealed danger of which the defendant was bound to give notice. It is not shown that the dangers were not apparent, or could not have been seen by the intestate. There is, necessarily, some degree of danger in all mines, and such dangers are increased by the age of the supports of the roof and other causes. It is not shown that these dangers were concealed by defendant and the intestate was induced or invited by defendant to expose himself thereto.

We conclude that the grounds of the demurrer which we have discussed were well taken, and the court correctly held the petition defective. The other objections raised by the demurrer need not be discussed.

Judgment affirmed.

HOFFBAUER V. DELHI AND NORTHWESTERN RAILROAD COMPANY.

(33 Iowa, 342.)

Carrier — passenger — expulsion for non-payment of fare — retaining part fare — offer of balance after stopping and before expulsion.

A passenger may be expelled from a railway train for non-payment of the whole legal fare, although the conductor retains the portion paid, and although after the stopping of the train to expel him and before expulsion the passenger offers the proper balance. (*See note, p. 280.*)

ACTION of damages for expulsion from railway train. The opinion states the points. The plaintiff had judgment below.

Grant & Grant and Peters & Heath, for appellant.

McCeney & O'Donnell, for appellee.

ADAMS, J. [Omitting an immaterial point.] The statute provides that an extra charge of ten cents may be made, where a ticket might have been procured within a reasonable time before the departure of the train. But in this case there is no pretense that a ticket might not have been procured within such time. The court instructed the jury, in substance, that if the plaintiff tendered sixteen cents, and the conductor received it and retained it, he was

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not justified in putting the plaintiff off the cars. The giving of this instruction is assigned as error.

The train had started and a part of the journey of four miles had been passed over when the conductor demanded of the plaintiff the payment of fare. The company was entitled at least to fare for the distance which it had carried him, at the rate of four cents per mile. It was also entitled to ten cents as an additional charge allowed by statute in such case. Whether the plaintiff rode a mile and a half, or the distance which six cents would pay his fare the evidence does not show, but even if it showed that he had not ridden that distance we do not think that the instruction could be approved. The plaintiff was certainly not entitled to be carried more than a mile and a half. But the plaintiff did not apply to be carried simply that distance, and probably did not desire to be. In the absence of any contract between the passenger and the company, it is proper for the company to put the passenger off as near the starting point as possible, provided the place is otherwise suitable. In this case there was no contract. The implied contract arising from the plaintiff's taking a seat in the cars had been broken by his refusal to pay. No contract arose to carry plaintiff to the end of the first mile and a half, because the money tendered by plaintiff, and received by defendant, was neither tendered nor received with such understanding. It may be, if the plaintiff was carried less than a mile and a half, that the defendant should have refunded something; but that obligation did not arise until the plaintiff's journey had been terminated; and even then we think that the defendant should have a reasonable time to ascertain the distance travelled and make the proper change.

The court further instructed the jury, in substance, that if the plaintiff, before his expulsion, tendered the full fare, including the extra charge of ten cents, then his expulsion was wrongful. The giving of this instruction is assigned as error. The defendant was entitled to full fare upon demand. The moment the plaintiff declined to pay it, the defendant was released from all obligation to carry him upon that train. *Stone v. Chicago & North-western R. R. Co.*, 47 Iowa, 82; s. c., 29 Am. Rep. 458; *O'Brien v. B. & W. R. R. Co.*, 15 Gray, 20.

The rule that a passenger may test the regulations of the company and the firmness of the conductor by refusing to pay full fare, and still save himself from expulsion by tendering full fare after

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expulsion had commenced, is not only uncalled for for the just protection of the recusant passenger, but would tend to encourage a practice which, if indulged in, would interfere with the convenience of the company, and the dispatch and quiet to which other passengers are entitled. In giving the instruction we think that the court erred.

Judgment reversed.

NOTE BY THE REPORTER. — In *O'Brien v. N. Y. Cent. & H. R. R. Co.*, 80 N. Y. 282, it was held that if the stoppage had been made for the sole purpose of putting plaintiff off, and he had rendered it necessary by a fractious refusal to pay the extra fare, he would not have been entitled to insist on continuing his trip after having occasioned such an interruption. But the station being a regular stopping-place of the train, if, before being ejected, he or others in his behalf offered to pay the full fare, the conductor should have accepted it. See, also, *Toledo, etc. Ry. Co. v. Wright*, 68 Ind. 586, s. c., 34 Am. Rep. 271, and note, 284, on both points of the principal case.

FIRST NATIONAL BANK OF CANTON V. DUBUQUE SOUTHWESTERN RAILWAY CO.

(88 Iowa, 373.)

Negotiable instrument — draft — not assignment of general fund.

A draft on a general fund in the drawer's hands, not accepted, is not an assignment of the fund.

PETITION in equity founded on a draft on defendant. The opinion states the facts. The plaintiff had judgment below.

Hubbard, Clark & Deacon, for appellant.

Blake & Hormel, for appellee.

DAY, J. The evidence establishes the existence of the following facts: In January, February and March, 1877, R. G. Brock & Co. delivered to the defendant twenty-six car loads of coal, of the value of \$1,200. Of these fourteen cars, of the value of \$653.96, were delivered prior to the 21st of February, and twelve car loads, of the value of \$546.24, were delivered subsequently to 21st of February, 1877. Under the arrangement between the parties coal delivered during any month was to be paid for on the 15th of the following

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month. On the 21st day of February, 1877, A. L. Williams, a member of the firm of Brock & Co., drew on the defendant the draft set out in the statement preceding this opinion. D. Williams & Son indorsed this draft in blank, and it was by Brock & Co. delivered to the plaintiff, Brock & Co. receiving therefor their own matured acceptance for \$1,000, and the balance in cash, less the discount. D. Williams & Son made an assignment for the benefit of creditors on the 2d day of March, 1877. On the 15th day of March, 1877, the defendant paid to A. L. Williams, member of firm of Brock & Co., \$786.70, which he paid to the plaintiffs. On the 13th day of March, 1877, Brock & Co. made an assignment for the benefit of their creditors. The claim in controversy against defendant was not inventoried in said assignment as a part of their assets. On the 16th day of March, 1877, A. L. Williams made a schedule of nine cars unpaid for, amounting to \$412.81, and assigned the amount due thereon to the plaintiff, in the name of R. G. Brock & Co. The defendant never accepted the draft, and refused to pay the plaintiff the balance due on the coal. On the 22d of March, 1877, the plaintiff gave defendant written notice of the execution of said draft, and that plaintiff claimed of defendant the balance due on the coal. Brock & Co., through R. G. Brock, compromised with their creditors, and thereupon R. G. Brock, in the name of Brock & Co., assigned the claim for the nine cars of coal in question to Hubbard, Clark & Deacon, to whom the defendant has made payment. The plaintiff in the petition does not allege the making of any assignment of the amount in question other than the drawing of the draft above referred to.

The plaintiff relies upon *McWilliams v. Webb*, 32 Iowa, 577. That case is essentially different in its facts from the present. In that case a simple order was drawn directly in favor of the party to whom it was held the assignment was made, and the amount of the fund was in the hands of the drawee. In this case an instrument possessing all the requisites of a bill of exchange was drawn, payable twelve days after date, with exchange, in favor of third parties, and by them indorsed in blank. The evidence shows that at the date of the drawing of this bill the defendant was not indebted to Brock & Co. in any portion of the amount now claimed, and whether or not it would become so indebted depended upon the contingency of the delivery of coal by Brock & Co. to the defendant.

The peculiar circumstances in *McWilliams v. Webb* justify the

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decision there made. In that case it is said: "The court was fully justified in finding, from all the facts and circumstances of the transaction as disclosed in the evidence, that it was the intention of Stoddard to transfer to Webb & Son his claim on the insurance company. The evidence shows that Webb & Son received the claim of Stoddard against the insurance company in payment of his indebtedness to Webb & Son, and that the latter accepted it in satisfaction of their claim, thus clearly indicating the intention to assign the debt for which the order was drawn." In the case at bar the plaintiff required the indorsement of Williams & Son, thus reserving a right of action against them, and as clearly indicating an intention not to accept the claim against the defendant in satisfaction of the sum due plaintiff. The question now is, whether the drawing of this bill of exchange, in the manner and under the circumstances appearing in this case, operated as an equitable assignment to the plaintiff of the sum which was afterward in the hands of the defendant, due Brock & Co. As has been said, the instrument drawn in this case has upon its face all the requisites of a negotiable bill of exchange. It is drawn upon a general, and not upon a particular fund.

In *Bank of Commerce v. Bogy*, 44 Mo. 1 (17), it is said: "A bill drawn upon a debtor does not, of itself, operate as an assignment in equity of the debt, even if it is negotiated for a good consideration. It is evidence tending to show such assignment, and with other circumstances to show that such was the intention of the drawer, will vest in the holder an exclusive claim to the indebtedness." In *Mandeville v. Welch*, 5 Wheat. 286, the following language is employed: "It is said that a bill of exchange is, in theory, an assignment to the payee of a debt due from the drawee to the drawer. This is undoubtedly true, when the bill has been accepted, whether it be drawn on general funds or a specific fund, and whether the bill be in its own nature negotiable or not; for in such a case the acceptor, by his assent, binds and appropriates the funds for the use of the payee. * * * In cases, also, where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee it binds the fund in his hands." In *Robbins v. Bacon*, 3 Me. 315, it appeared that a book debt was due from Robbins to Bacon, and that Robbins drew out a bill of the particular items, and at the bottom of the account wrote an assignment to Stockbridge of the amount of the

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account. It was held that this amounted to an assignment. In *Walker v. Monro*, 18 Mo. 564, it was held that an order drawn for the whole of a debt is an equitable assignment of it, and the party in whose favor the order is drawn may sue for the debt in his own name. In *Cowperthwaite v. Sheffield*, 1 Sand. 416, it was held that two negotiable bills of exchange, similar to the one in question in this case, did not operate as an equitable assignment of a fund in the hands of the drawee. In that case the court say: "The instruments here were ordinary bills of exchange. They did not on their face purport to be drawn on any particular fund, nor did they import that their payment was to depend upon any particular contingency. In *McMenomy v. Fener*, 3 Johns. 72, it was held that where an order is drawn for an entire fund, the fund being particularly stated in the order, it operates as an assignment of the fund. *Peyton v. Hallett*, 1 Cai. 363. If these bills had been in the form of orders for the entire proceeds of the shipment of cotton, they might, after notice to the Kelleys, have operated as an assignment of such proceeds. But then they would not have possessed all the characteristics of bills of exchange." In *Wheeler v. Stone*, 4 Gill, 38 (47), it is said: "An insuperable objection to the view thus presented by the counsel for the appellees is, that a bill of exchange, although accepted, unless drawn on a particular fund, does not operate to invest the payee with the character of an assignee. In the case of *Sheppard v. State, use of Weisel*, the Court of Appeals at its last session held that even an accepted bill, unless drawn on a particular fund, does not operate to invest the payees with the character of an assignee of the fund. The case in 5 Hill, 416, is decisive upon this point. In *Harrison v. Williamson*, 2 Edw. 430, it was determined that a bill of exchange has not the effect of an assignment of the money for which it is drawn, in the hands of the drawee, unless, perhaps, where it is drawn upon a particular fund, and then, indeed, by the law merchant, it loses its character as a bill of exchange." In *Sands v. Matthews*, 27 Ala. 399, it was held that a bill of exchange, until accepted, does not operate as an assignment of the funds in the hands of the drawee. See Edw. on Bills, 172; Byles on Bills, 67, 96 and 191, and notes; 1 Pars. on Notes and Bills, 42, 43, 290, 291, 299 and 300, and authorities cited.

From the authorities above cited the following principles are deducible:

First. That a bill of exchange drawn upon a general or particular fund operates as an assignment to the payee of a debt due from the drawee to the drawer, when the bill has been accepted by the drawee.

Second. That a bill of exchange drawn upon a general fund, but not accepted by the drawee, does not operate as an assignment of the fund, but is mere evidence of an assignment, and with other circumstances showing that such was the intention, will vest in the holder an exclusive claim to the fund, and bind it in the hands of the drawee after notice.

Third. That an order upon the whole of a particular fund, though not accepted, will operate as an equitable assignment of the fund, and bind it in the hands of the drawee after notice, but that such order does not possess the property of negotiability.

It is clear from the foregoing considerations that the bill of exchange in question in this case does not constitute an assignment of the fund which afterward came into the hands of the defendant, belonging to the drawer of the bill, but that at the most it is but proof tending, but insufficient of itself, to show such assignment. As has before been said, the fact that the plaintiff required the indorsement of Williams & Son negatives the idea that it received the bill as an assignment of the fund in the hands of the defendant in satisfaction of the debt due the plaintiff. The only circumstance which tends to show that Brock & Co. intended the bill as an assignment of this fund is the fact that they omitted to include this claim in the inventory of their assets when they made an assignment for the benefit of creditors. But this circumstance is susceptible of explanation upon other grounds, and we do not regard it as sufficient to evince an intention to assign this claim at the time the bill was drawn. The assignment of the account by Williams on the 16th of March, 1877, cannot be regarded for two reasons: 1st. The property of Brock & Co. was then in the hands of an assignee for the benefit of creditors, and not under their control. 2d. The petition does not allege that any assignment was made other than by drawing the bill of exchange in question.

In our opinion the plaintiff has failed to show an assignment to it of the claim in question. The judgment in favor of the plaintiff is erroneous.

Judgment reversed.

Darland v. Taylor.

DARLAND v. TAYLOR.

(82 Iowa, 503.)

Gift — declarations of donor — destroying notes.

One who held her grandson's promissory notes destroyed them, stating that she did not expect to live long, and in case of her death did not desire that he should be compelled to pay them. On her death, *held* a complete and valid gift *causa mortis*.

ACTION for price of land. The opinion states the facts. The plaintiff had judgment below.

Lafferty & Johnson and *Redman & Carr*, for appellant.

Bolton & McCoy, for appellee.

DAY, J. The material facts established by the evidence are as follows: Alsey Darland died on the 25th day of February, 1872, at the age of about seventy-three. She was the mother of Martha P. Taylor, who was the mother of J. D. Taylor and the defendant, W. H. Taylor. Martha P. Taylor had for many years been a widow, and was insane. Alsey Darland had taken care of her daughter ever since she became insane, and had raised her two sons, J. D. and W. H. On the 20th day of July, 1859, Alsey Darland, in order to make permanent provision for the future support of her daughter Martha P. Taylor, conveyed to her grandson J. D. Taylor eighty acres of land. The price agreed upon for this land was \$1,600, of which J. D. Taylor paid \$300, and agreed to pay \$300 more, and was to have the use of the remaining \$1,000 for supporting his mother during her lifetime, and at the death of his mother, Martha P. Taylor, this \$1,000 was to go to J. D. Taylor's children. Pursuant to this arrangement J. D. Taylor supported his mother for a time, but finally he left the place, rented it out and ceased to maintain his mother, and Alsey Darland became dissatisfied. Sometime about the 1st of January, 1872, it was arranged between Alsey Darland, W. H. Taylor, and J. D. Taylor, that W. H. should purchase the interest of J. D. in the property, and assume his obligation for the support of their mother. In accordance with this arrangement W. H. paid J. D. \$450, the amount of the payment which he

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had made, and of some improvements which he had placed upon the land, and assumed the payment to Alsey Darland of the deferred payment of \$300 and interest. The balance of the consideration, \$1,000, he was to have for supporting his mother. W. H. Taylor has supported and cared for his mother ever since this arrangement was made. A short time after this arrangement was made, W. H. Taylor tendered to Alsey Darland his notes for \$400 for the unpaid purchase money. She refused to take the notes, saying that if she wanted any thing she could get it as well without a note as with it. Alsey Darland having refused to take the notes, her son Wm. L. Darland took them and locked them up. Two or three weeks thereafter Alsey Darland called for the notes, and her son delivered them to her. About the 1st of February, 1872, which was a little more than three weeks before her death, she tore the notes up. The next morning at the breakfast table she stated that she could not sleep the night before until she got up and tore up the notes on W. H. Taylor. When asked what she did that for, she said that she felt unwell and thought she was liable to die at any time, and if she died she did not want W. H. Taylor to have those notes to pay. At the time Alsey Darland refused to accept the notes she was talking of going to Oregon, and she then told the defendant if he would pay her \$300 she would not charge any interest. Afterward the defendant told his grandmother that he had spoken to some one to borrow the \$300 for her, and she then said that \$300 or \$400 would not get the notes; that she had destroyed them; that she thought she would not live very long, and she didn't intend to leave any thing for her children to quarrel over. At the same time she said she did not want the defendant to pay the notes. About two weeks before her death Alsey Darland was taken from her son's, W. L. Darland, to the defendant's. She took sick the next day and remained ill until her death. During this time she said that she wanted the defendant to have what she had for keeping his mother; that his mother would not stay at any other place; that she was studying about a note she had; that she thought about the note while she was staying at Wm. L. Darland's one night after she went to bed, and thought she would get up and destroy the note, so her children would not get it; that she did destroy the note so her children would not get the property, and that W. H. Taylor would get it; that she intended for W. H. Taylor to have it. The court below held that declarations of the deceased

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are insufficient in themselves to establish a gift; that the recovery of the deceased after the night on which she destroyed the notes operated as a revocation of the so-called gift; that there was no delivery or acceptance, and that the evidence does not show clear and unmistakable proof of a gift. Judgment was accordingly entered against the defendant for the amount of the notes and interest, \$640.

The court grounded the opinion that the declaration of the donor is in itself insufficient to establish a gift upon *Burney v. Ball*, 24 Ga. 565. What is there said upon the subject is as follows: "Our opinion is that the declarations of the donor that he had given are always admissible in evidence in cases of this sort. We have heretofore held, and still hold, that they are insufficient of themselves to establish a gift. To constitute a good and valid gift there must be a delivery, actual or constructive, or as it is termed sometimes, symbolical, or a writing." It is evident from the foregoing that the court simply determined that the declarations of a donor that he had made a gift are not sufficient without some proof of delivery, actual or constructive. It is not held, nor intimated, that the declaration of the donor is not admissible to establish the facts from which a delivery may be inferred. That such facts may be established by the declaration of the donor we do not doubt.

The court further held that there was no delivery or acceptance of the gift, and that both are necessary. The authorities hold that the delivery may be actual or symbolical. In *Grangiac v. Arden*, 10 Johns. 293, a father bought a ticket in a lottery, which he declared he gave to his daughter, and wrote her name upon it. After the ticket had drawn a prize he declared that he had given the ticket to his child, and that the prize money was hers. This was held sufficient to authorize a jury to infer all the formality requisite to a valid gift, and that the title to the money was complete and vested in the daughter. In *Gardner v. Gardner*, 22 Wend. 525, a debt contracted by the wife was held to be discharged, as a gift, *causa mortis*, by the husband's destroying the bond, the evidence of the debt, and declaring that the money was hers. See, also, *Blaisdel v. Locke*, 52 N. H. 238.

In *Hillebrant v. Brewer*, 6 Tex. 45, where the father branded certain cattle in his son's name, and recorded the brand, it was held sufficient to establish a symbolical delivery. The destruction of the notes, together with the repeated declarations of the deceased

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that she did not intend the defendant to pay the debt, constitute a sufficient delivery under the authorities cited. As the gift was for the benefit of the donee and coupled with no condition, his acceptance of it, from all the circumstances proved, in the absence of any opposing testimony, must be presumed. *Blaisdel v. Locke*, 52 N. H. 238 (244).

The court further held that the gift was made by the donor in apprehension of death before morning, and that as she did not die, there was a revocation of the gift. The evidence does not at all sustain the position that the gift was intended to be operative only in the event of the death of the donor before morning. Upon the contrary the evidence clearly shows that the deceased desired to discharge the defendant from liability upon the notes, and that the destruction of the notes was made at the time in question because she feared that she might die before morning, and thus be prevented from discharging the defendant as she desired. Afterward, and during her last sickness, and but a short time before her death, the deceased declared that she had destroyed the notes so that W. H. Taylor would get the property, and that she intended him to have it. There was not, we think, any revocation of the gift.

The evidence, we think, establishes a completed and valid gift, *causa mortis*, of the amount of the notes in question.

Judgment reversed.

 ALLEMAN V. STEPP.

(28 Iowa, 626.)

Evidence — impeachment of witness' mental capacity.

Evidence is competent to show that the mind and memory of a witness have become impaired by disease and are in a feeble condition. (*See note, p. 261.*)

ACTION for services. The opinion states the case. The plaintiff had judgment and appeals.

Holmes & Reynolds, for appellant.

Kidder & Crooks, for appellee.

BECK, O. J. The petition declares upon an account for services rendered by plaintiff, as a surgeon, in reducing fractures of the bones of defendant's leg, the amputation of the thigh, and attendance until the defendant's recovery.

The answer admits the services, but as a defense pleads that there was a difference between the parties as to the true and just amount of plaintiff's bill, and thereupon they had a settlement and plaintiff agreed to charge \$250 for his services, which defendant then undertook to pay. Under this settlement it is alleged that, after deducting credits given by plaintiff in his account, there remains due plaintiff, the sum of seven dollars and no more, and for that amount defendant offers to confess judgment.

[Omitting a minor point.]

The defendant testified to the settlement as alleged in his answer; it was denied by plaintiff. It can hardly be said that defendant's testimony is corroborated, but the abstract does not purport to give all the evidence. The plaintiff introduced a physician who testified that he had known the defendant from a time prior to the amputation of his limb. He was then asked to state the condition of defendant's mind as to memory before and after the injury; to state the effect of the injury upon defendant's memory as to money and finances in particular, and to state whether, in the opinion of the witness, the mind of defendant was greatly impaired. The evidence, upon defendant's objection, was rejected. We think the ruling erroneous. Surely, if defendant was suffering from an impaired mind, which affected his memory, the fact would tend to lessen the credit to be given to his testimony. Can it be doubted that the credibility of a witness may be assailed by showing his want of mental capacity? It is said that the infirmity of memory should be shown by cross-examination. But it might not be made to appear in that way, though it really existed. The witness was a physician and knew the defendant before and after the injury and the condition of his mind as to memory. He was surely competent to state the fact of defendant's loss of memory, and in our judgment he was competent to state his opinion of the defendant's mental condition, based upon his knowledge and observation of the defendant before and after injury. If in this way it should be made to appear that defendant's memory was impaired by disease, his credibility would be impeached.

Under familiar rules of the law the credibility of a witness may

be impeached by showing moral defects. Mental defects in the witness, or loss or impairment of memory, will, according to the observation of all men, detract from the credibility otherwise due a witness, just as surely as do moral defects. It is not reasonable to hold that the law will permit impeachment of a witness by showing the moral defects of his character, and will not permit impeachment by proof of defects of memory caused by diseases of the body or mind.

Under the rules of evidence, and statutes of this State, a witness may be impeached by proof of his bad moral character, and that his reputation for veracity is so low that he cannot be believed under oath. The impeaching witness states his conclusions, belief or opinions, based upon knowledge of the character and reputation of the witness whose credibility is brought in question. The like course was proposed in this case, to impeach the defendant by showing his mental defects. The testimony excluded was of the conclusion, belief and opinion of the witness, based upon knowledge, that defendant's memory was impaired by disease affecting the mind.

It is proper to say that the rule we recognize extends no farther than to permit the impeachment of a witness by showing an abnormal condition of the mind caused by disease, or habits which impair the memory. It will not permit evidence of the want of strength or accuracy of memory of a witness whose mind is not shown to be in an abnormal condition. While it is true that the memories of men of sound physical and mental health are not equally strong and accurate, or they are unequal in other faculties of the mind and in physical development, the law can devise no standard of measurement or test of the mind in its normal condition. It cannot be compared with the mind of others in order to impeach or support the memory. Our conclusion upon this point of the case finds support in the following authorities. *Isler v. Dewey*, 75 N. C. 466; *Fairchild v. Bascomb*, 35 Vt. 398; 2 Phill. Ev., Cow. & Hill and Edward's notes, 950, note 596; *Sisson v. Conger*, 1 Thomp. & C. 564; *Rivara v. Ghio*, 3 E. D. Smith, 264; *Livingston v. Kiersted*, 10 Johns. 362. See, also, as tending the same way, *Flemming v. State*, 5 Humph. 564; *Tuttle v. Russell*, 2 Day, 201; 2 Am. Dec. 59; *McDonald v. Preston*, 26 Ga. 528. GIBSON, J., *arguendo*, in *Brindle v. McIlvain*, 10 S. & R. 285. A contrary doctrine is held in *Goodwyn v. Goodwyn*, 20 Ga. 600.

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Other questions in the case, as it is not probable they will again arise upon another trial, need not be considered. For the error in excluding the evidence offered by plaintiff, the judgment of the District Court is reversed.

Judgment reversed.

SEEVERS, J. I concur in the result reached in the foregoing opinion, but as I understand, it goes further than I am willing to go. That evidence is admissible to show that the mind or memory of a witness has become impaired or abnormal by reason of disease, I think is true, and this in substance the plaintiff offered to show, but he went farther and by another question offered to show the "effect of the injury upon defendant's memory, as to money and finances in particular." This was not in my judgment admissible. The impaired or abnormal condition of the mind being shown the effect was for the jury to determine.

NOTE BY THE REPORTER. — In *Eler v. Dewey*, 76 N. C. 466, the court said: "A person entirely without memory is incompetent as a witness, and if his memory is weak naturally, or has been impaired by disease or age, his testimony will naturally have less weight with a jury than if his memory was sound and unimpaired. To prove of a witness that his memory is weak, is a legitimate way of impeaching his testimony, and the opinions of those who know him may be resorted to for that purpose."

In *Livingston v. Kiersted*, 10 Johns. 368, the court said: "If it could have been shown to the court below that the witness was deranged, or had not the ordinary understanding, he must have been excluded as incompetent. Idiots, lunatics, and madmen are not competent witnesses, and this must be shown to the court by proof, like any other charge of incompetency."

In *Siam v. Conger*, 1 T. & C. 564, an attending physician had testified as to the mental capacity of a testator. It was held that evidence was competent to show that the witness was at the time of attendance on the deceased under the influence of intoxicating liquor and incapable of judging of his mental condition. The court quoted from 1 Cow. & Hill's Notes: "In addition to the direct contradiction of the witness you may impeach him by proving that at the time of the transaction he was in such a state of mind as to be incapable of exercising a correct discrimination; one among other grounds is that he was intoxicated." "A habit, such as drunkenness or paralysis, may be shown in truth to exist as impairing the powers of discrimination or recollection in a witness."

Fairchild v. Bascomb, 35 Vt. 308, was a case precisely like the principal case. Evidence that the witness' mind was then affected by a disease of the brain a year before, was held competent, "as tending to show that his memory and his judgment (both of which were in question) were less to be relied on than if he possessed full mental health and vigor. It is admissible as affecting the degree of credit to be given to him."

In *Holcomb v. Holcomb*, 38 Conn. 177, the court said: "There is no doubt that a person should be excluded from giving evidence who is insane at the time he is offered as a witness." But this was *obiter*, for the court said: "No question was made as to his sanity at the time he was sworn;" the only question in the case was as to his sanity at the time of the transactions sworn to, and as to that, evidence was held competent.

In *Ritara v. Ghio*, 3 E. D. Smith, 284; it was held that evidence that a witness, who has been examined, has been of imbecile mind and memory, is admissible to affect the credibility of his testimony, although not offered as an objection to his competency before he is sworn. The court, Woodsuff, J., said: "It is true that the defendant's counsel states his object to be to prove that the witness had been of imbecile mind and memory. If this were to be taken as a mere offer to prove that at some former period the witness had been

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thus afflicted, and without any inference that that state of things continued to the time of the transaction in question, or to the time of the trial, it was immaterial and irrelevant. But proof of imbecility of mind would raise a presumption that such condition continued, and might justly detract from, if it did not altogether destroy, the weight to be given to the evidence of the witness."

But in *Goodwyn v. Goodwyn*, 20 Ga. 600, it was held that such evidence is incompetent; the effect can be produced only by cross-examination. The court, SHAPKIN, J., said: "No authority has been produced to justify it, and we know of no practice to sanction the introduction of testimony not to impeach the veracity but the memory of the witness. It would be attended with great inconvenience, and hinder and delay the progress of business, by turning aside to form these collateral issues. Once open the door to this sort of investigation, and it would not be restricted to the memory, but would apply to any real or supposed deficiency in any other mental faculty." But the same judge, in *McDonell v. Preston*, 26 Ga. 533, seemed to regard such evidence competent, for he says: "Was it right to permit the testimony of Mrs. Davidson to be discredited or even weakened by proving that she was in the habit of taking laudanum, without going further, and showing that her mind was impaired by it, or was at least under the influence of it at the time she testified? We think not."

Flemming v. State, 5 Humph. 564, only involved the witness' mental condition at the time of the transactions testified to, and as to that, evidence was held competent.

In *Brindle v. [McIlvaine]*, 10 S. & R. 283, the doctrine of the principal case was recognized *obiter*.

See *Coleman v. Com.*, 25 Gratt. 333; s. c., 18 Am. Rep. 711.

CASES
IN THE
SUPREME COURT
OF
MAINE.

CUSHING V. FIELD.

(70 Me. 32.)

Negotiable instrument — alteration — when immaterial.

A note was indorsed on its face, "subject to a contract made," etc. This language was changed, without authority of the maker, to "subject of contract made," etc. *Held* immaterial, because the note was not negotiable.

ACTION on a promissory note by a transferee. The opinion states the case. The plaintiff had judgment below.

Baker & Folsom, for plaintiff.

D. D. Stewart, for defendant.

APPLETON, C. J. This is an action on a promissory note of the following tenor:

"SKOWHEGAN, Maine, *October*, 1874.

"One year after date I promise to pay to the order of C. B. Mahan four hundred and eighty-seven dollars, at the Granite National Bank, Augusta, Maine. Value received.

"EDWARD A. FIELD."

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The note was indorsed "C. B. Mahan, agent of the Granite Agricultural Works, Lebanon, N. H."

There was also an indorsement across the extreme edge of the note, thus:

"This note is subject of a contract made November 13, 1874."

The note, though having a different date, is shown to have been executed on November 13, 1874, when the following contract was signed:

"Office of the Granite Agricultural Works, Proprietors of the Granite Mower and Reaper, Manufacturers and Dealers in Agricultural Implements, Iron and Wood-working Machinery.

"LEBANON, N. H., Nov. 13, 1874.

"Edward A. Field bought of Granite Agricultural Works:

| | |
|---|----------|
| 1 No. 6 Mower and Reaper, 5 feet cut..... | \$140 00 |
| 1 No. 0 " " " 4 " 9 " | 75 00 |
| 2 No. 1 " " " 4 " 6 75..... | 150 00 |
| 1 No. 2 " " " 4 | 75 00 |
| 4 No. 1 Side Hill Plows 11.75..... | 47 00 |

\$457 00

"Received by note due Oct. 1st, 1875, payable at Granite National Bank."

"We hereby agree with the said Field that if he should not be able to sell all the above goods before July 30, 1875, and shall notify us of such fact by mail, or otherwise, at that time, we will then send a general agent to assist him in the sale of the same. If then neither our agent nor the said Field can succeed in selling all the above goods before August 1, 1875, then we will take them off his hands and pay him the same prices at which they are now billed to him, with all money paid out for railroad freight charges on same from our factory. We hereby reserve the right to send an agent to assist said Field at any time when we deem it necessary, in order to secure the sale of said goods, and will account to the said Field for all goods so disposed of by us. It is also further agreed that if the said Field shall succeed in selling all the said goods, either alone or with our aid, before August 15, 1875, then

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the said Field shall pay his obligation given this day for the same, in good faith, and the same as if this agreement had not been given at all.

"The above goods shall be well housed and properly cared for at all times.

"All the above goods are warranted from flaws or other defects in manufacturing.

"GRANITE AGRICULTURAL WORKS,
"C. B. MAHAN, *Agent*."

"I hereby accept the terms of the above agreement, and will accept the goods named above in good faith, and do the best I can soon as sent to sell the same and pay for them as above specified.

"EDWARD A. FIELD."

The Granite Agricultural Works were burned, and a mowing machine valued at seventy-five dollars was the only article in the bill of goods which the defendant ever received, and it was for this that the verdict was rendered.

The note, the memorandum upon it and the contract referred to are to be construed together as part of one and the same transaction. *Davlin v. Hill*, 11 Me. 434; *Johnson v. Heagan*, 23 id. 329; *Stocking v. Fairchild*, 5 Pick. 181; *Barnard v. Cushing*, 4 Metc. 230.

The note in suit is not negotiable. In *Jones v. Fales*, 4 Mass. 245, a note was given in the usual form, on which at the bottom was written "[Foreign Bills]," and these words were held to destroy its negotiability. In *Amer. Ex. Bank v. Blanchard*, 7 Allen, 333, the words "subject to the policy" were held to incorporate the policy into the contract for the payment of money and to make the latter dependent on the contingency that no claim would arise on the policy against the company before the expiration of the time when the promise would mature. As the promise was conditional and not absolute, the note was held not to be negotiable. In *Benedict v. Cowden*, 49 N. Y. 396; s. c., 10 Am. Rep. 382, the facts were somewhat similar to those of the case at bar. The defendant gave his note, at the bottom of which were these words: "The above note to be paid from the profits of machines when sold." This memorandum was held to be a substantive part of the note, and that it qualified it the same as if it had been inserted in the

body of the instrument, and consequently that the note was not negotiable. The assignee takes it subject to all the equities between the original parties.

It is claimed that the words on the note have been altered and that the indorsement across the end of the note was originally thus: "This note is subject of a contract made Nov. 13, 1874." The alteration relied on consists in changing "to," as it is claimed it was originally written, to "of." It is difficult to imagine what motive anybody would have to make such a change. If made it does not alter the relation of the parties. Whichever word is used, the note is subject to the contract. The idea that such an alteration was fraudulently made is simply preposterous. The probability is much greater that it was written "of" and then "of" changed to "to," for the purpose of making the intention, if possible, more clear. But either way nobody could be harmed.

But it is well settled that an immaterial alteration will not avoid a contract. In *Aldous v. Cornwell*, L. R., 3 Q. B. 573, it was held that the second resolution in *Pigot's* case (11 Rep. at fol. 27 a), that "if the obligee himself alters the deed, * * * although it is in words not material, yet the deed is void," was not to be regarded as law. "No authority was cited," remarks LUSH, J., "nor are we able to find any, in which the doctrine has been acted upon, and an instrument held to be avoided by an immaterial alteration." In *Langdon v. Paul*, 20 Vt. 217, where the plaintiff offered a sealed instrument in which he acknowledged he had "signed" certain notes, and the words "and executed" were interlined, it was held that the interlineation was immaterial. Whenever, by the alteration of a promissory note, neither the rights nor interests, duties nor obligations of either of the parties are in any manner changed, the alteration is immaterial. *Derby v. Thrall*, 44 Vt. 413; s. c., 8 Am. Rep. 389; *Arnold v. Jones*, 2 R. I. 345; *Ames v. Colburn*, 11 Gray, 390; *Cole v. Hills*, 44 N. H. 227.

Defendant's exceptions sustained.
Plaintiff's motions and exceptions overruled.

WALTON, BARROWS, VIRGIN and LIBBEY, JJ., concurred.

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BLAKE V. MAINE CENTRAL RAILROAD COMPANY.

(70 Me. 60.)

Master and servant — negligence — of co-servant.

A master is not liable to his servant for injury resulting from the negligence of a fellow-servant in the same general employment, although the servants are not engaged in the same kind of work, and the negligent servant is superior in grade, and the servant injured was bound to obey his orders, unless the negligent servant was incompetent, and the master knew, or in the exercise of due diligence should have known of his incompetency; and competency is presumed to continue until notice of change.*

ACTION by administrator for damages for death of intestate by negligence. The case is disclosed in the last two paragraphs of the opinion.

E. F. Pillsbury & J. H. Potter and E. F. Webb, for plaintiff.

J. H. Drummond & J. O. Winship, for defendant.

APPLETON, C. J. It has been settled by an almost unbroken series of decisions that a master is not liable to a servant for an injury resulting from the negligence of a fellow-servant in the same general employment. The servant undertakes between himself and his master to run all the ordinary risks of the service, including that of the negligence of his fellow-servants. *Beaulieu v. Portland Co.*, 48 Me. 295; *Lawler v. Androscoggin R. R. Co.*, 62 id. 467; s. c., 16 Am. Rep. 492; *Warner v. Erie Railway Co.*, 39 N. Y. 469; *Ziegler v. Day*, 123 Mass. 152.

When there is one general object, in attaining which a servant is exposed to risk, if he is injured by the negligence of another servant whilst engaged in furthering the same object, he is not entitled to sue the master; and it does not matter that they were not engaged in the same kind of work. *Charles v. Taylor*, L. R., 3 C. P. Div. 492; *Lovill v. Hawk*, L. R., 1 C. P. Div. 161; *Tunney v. Midland Railway Co.*, L. R., 1 C. P. Div. 296; *Seaver v. Boston & Maine R. R. Co.*, 14 Gray, 467.

* See *Kelly v. Silver Spring Co.* (23 B. I. 113), 34 Am. Rep. 615; contra, *Chicago & N. W. R. Co. v. Moranda* (36 Ill. 305), 34 Am. Rep. 183.

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Nor is the rule that a master is not liable to a servant for the negligence of a fellow-servant in their common employment altered by the fact that the servant guilty of such negligence is a servant of superior authority, whose lawful directions the other is bound to obey. *Fultham v. England*, L. R., 2 Q. B. 33. "A fellow-servant I take to be any one who serves and is controlled by the same master," observes DALRIMPLE, J., in *McAndrew v. Burn*, 39 N. J. 115.

The master is liable for negligence in the selection of his servants, but he does not warrant their competency. To recover for an injury caused by the incompetency of a fellow-servant, it must be shown that such incompetency was known, or should have been known to the master if he had been in the exercise of ordinary diligence. *Lawler v. Androscoggin R. R. Co.*, 62 Me. 467; s. c., 16 Am. Rep. 492. The master is not liable if he use ordinary care and prudence in the selection of competent workmen and materials. *Cotton v. Edwards*, 123 Mass. 484; *Cummings v. Grand Trunk Ry. Co.*, 4 Cliff.

The negligence of the master in not selecting competent servants is the basis of his liability, and it must be distinctly set forth in the declaration. The master is under obligation to use due care and diligence in the selection and employment of his agents and servants, and for want of such care is responsible to all other servants for any damages that may thence arise. *Harper v. Ind. & St. Louis R. R. Co.*, 47 Mo. 567; s. c., 4 Am. Rep. 353; *Moss v. Pacific R. R. Co.*, 49 Mo. 127; s. c., 8 Am. Rep. 126. The responsibility is not merely for the negligence of his servants, but for his own. While the duty of a master to his servant requires the exercise of great care in the employment of fellow-servants, and the institution of due inquiry to ascertain their character and qualifications, when suitable and competent persons have been employed, the same degree of diligence is not required. Good character and proper qualifications once possessed may be presumed to continue, and the master may rely on that presumption until notice of a change. *Chapman v. Erie Company*, 55 N. Y. 579.

The declaration in the writ sets forth that the plaintiff's intestate was in the employ of the defendant corporation; that while so in their employ, and in the exercise of due care and diligence, he was severely injured, underwent great suffering, and ultimately lost his life, by reason of the careless and reckless acts of certain servants of the defendants employed in and about their business, and intrusted

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by them "with the care and conduct of one of their locomotive engines then and there propelled by steam," to which a car was attached, etc., "and that said injury, suffering and loss of life were the direct result of the negligence, carelessness and recklessness of the defendants, and of their gross carelessness and negligence in appointing unsuitable employees to manage the running of said locomotive engine and car," etc.

The demurrer to the declaration is general. Errors, which might be deemed fatal on a special demurrer, will be disregarded when the demurrer is general. The allegation that the injury, suffering and loss of life of the plaintiff's intestate was the direct result of the negligence, carelessness and recklessness of the defendants, and their carelessness and negligence in appointing unsuitable employees by whom the engine was negligently managed, would seem to be a sufficient averment that the negligence of the defendants in not selecting competent servants was the cause of all the grievances for which remuneration is sought in this suit. As the demurrer admits all the facts set forth in the declaration, we think a good cause of action is disclosed in the first count. It becomes unnecessary therefore to particularly discuss the second count in the plaintiff's writ.

First count in the writ adjudged good.

WALTON, BARROWS, VIRGIN and LIBBEY, JJ., concurred.

HOAR V. MAINE CENTRAL RAILROAD COMPANY.

(70 Me. 65.)

Carrier — of passengers — injury on hand-car.

In absence of proof that a railway company is accustomed to carry passengers upon hand-cars, one who is injured while thus riding has no cause of action against the company, although invited thus to ride by the section foreman.

ACTION by administrator for damages for death of intestate by negligence. The opinion states the case.

E. F. Webb, for plaintiff.

J. H. Drummond, for defendants.

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APPLETON, C. J. The material and substantive allegations in the several counts in the plaintiff's writ are that the defendants are common carriers of passengers between Waterville and West Waterville; that as such carriers they are bound to carry all passengers and persons lawfully on their road carefully and safely over the same; that the plaintiff's intestate, being invited by one Potter a foreman of a section, in their employ and entrusted by them with the care and control of one of their hand-cars, to ride with him on said hand-car from Waterville to West Waterville, accepted the invitation; that the plaintiff's intestate while riding was run over by one of the defendants' engines to which a paymaster's car was attached, and injured so that he died, and that this was through the negligence of the defendants and their servants, the deceased being in the exercise of due care.

To each count of the declaration the defendants filed a general demurrer.

I. The liability of a railroad company differs as to their duty to their servants and to passengers. They are liable to servants for injuries resulting from want of due care in the selection of fellow-servants, but if duly selected they do not guarantee against their negligence. *Blake v. M. C. R. R. Co.*, 70 Me. 60, *ante*. Not so as to passengers, to whom they are responsible for injuries arising from their negligence or incapacity, irrespective of the question of more or less care in their selection. It is obvious that there is no defect in the declaration so far as it relates to the negligence of the defendants, if they are to be deemed common carriers by hand-cars.

II. The plaintiff's intestate was to be carried gratuitously. But that does not place him in a different position, so far as relates to his right to protection from neglect, from a pay passenger — if he is to be regarded as a passenger to be carried by the defendants. *Phil. & Read. R. R. Co. v. Derby*, 14 How. 468; *Wilton v. Middlesex R. R. Co.*, 107 Mass. 108; s. c., 9 Am. Rep. 11; *Whart. on Neg.* § 355.*

III. The plaintiff places her right to recover upon a neglect by the defendants of their duties to the intestate as common carriers. To impose upon the defendants the duties and responsibilities of common carriers, they must be shown to be such. The grave and important question, then, is whether the defendants, though com-

*To same effect, *Brennan v. Fairhaven & Westville Railroad Co.*, 45 Conn. 284; s. c., 29 Am. Rep. 679; *Lemon v. Chancellor*, 68 Mo. 240; s. c., 30 Am. Rep. 792.

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mon carriers of passengers along their road and in their cars for that purpose, are common carriers of passengers by their hand-cars used by their section men. Were the defendants chartered as common carriers save by their cars for passengers? Have they by their acts or conduct held out to the public, or authorized their agents to hold out to the public, that they were common carriers by their hand-cars? If they have not been chartered, and have not in any way held themselves out as common carriers by hand-cars, then the duties and obligations resting upon them as carriers have not arisen.

If the defendants were common carriers in relation to the plaintiff's intestate, they would be bound to carry all who should apply. Were, then, the defendants bound to carry on their hand-cars any one asking to be so conveyed? Assuredly not.

In *Graham v. Toronto, Grey & Bruce Railway Co.*, 23 Up. Can. (C. P.) 514, the defendants agreed, with a contractor for the construction of their railway, to furnish a construction train for ballasting and laying the track for a portion of their road then under construction; the defendants to provide the conductor, engineer and fireman; the contractor furnishing the brakemen. On October 31, 1872, after work was over for the day and the train was returning to Owen Sound, where the plaintiff, one of the contractor's workmen lived, the plaintiff, with the permission of the conductor but without the authority of the defendants, got on. Through the negligence of the person in charge of the train an accident happened, and the plaintiff was injured. "The fact," remarks HAGARTY, C. J., "that the defendant's engine-driver or conductor allowed him to get on the platform, does not alter my view of the case.

"I cannot distinguish it from the case of a cart sent by its owner under his servant's care to haul bricks or lumber for a house he is building. A workman, either with the driver's assent or without any objection from him, gets upon the cart. It breaks down, or by careless driving runs against another vehicle, or a lamp-post, and the workman is injured. I cannot understand by what process of reasoning the owner can in such case be held to incur any liability to the person injured. Nor, in my opinion, would the fact that the owner was aware that the driver of his cart often let a friend or person doing work at his house drive in his cart, make any difference. * * * It could never be, I think, in the reasonable

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-expectation of these defendants that they were incurring any liability as carriers of passengers, or that they should provide against contingencies that might affect them in that character."

A similar question arose in *Sheerman v. Toronto, Grey & Bruce Railway Co.*, 34 Up. Can. (Q. B.) 451, where one of the workmen was being carried, without reward, on a gravel train, and was injured so that he died, it was held that the deceased was not lawfully on the cars with the consent of the defendants, and a nonsuit was directed. "The workmen," observes WILSON, J., "were not lawfully on the cars. They were not passengers being carried by the defendants. They were acting on their own risk, not at the risk of the defendants, and however unfortunate the disaster may have been, it is only right the legal responsibility should fall on those who ought to bear it, and not upon those upon whom it does not rest." In this case "it appeared that it was not necessary the defendants should carry the men to and from their work, and that they never agreed to do more than to provide cars for carrying ballasting and materials for track laying."

The defendants not being common carriers, so far as relates to their liability to the plaintiff's intestate, the declaration not disclosing facts which show such liability, must be adjudged bad. *Eaton v. Delaware, L. & W. R. R. Co.*, 57 N. Y. 382; s. c., 15 Am. Rep. 513; *Union Pacif. R. R. Co. v. Nichols*, 8 Kans. 505; s. c., 12 Am. Rep. 475; in *Dunn v. Grand Trunk Ry. Co.*, 58 Me. 187; s. c., 4 Am. Rep. 267, the plaintiff was riding in a saloon car attached to a freight train, and paid the customary fare for conveyance in a passenger car.

IV. A master is bound by the acts of his servant in the course of his employment, but not by those obviously and utterly outside of the scope of such employment. If not common carriers, a section foreman with his hand-car has no right to impose upon the defendants the onerous responsibilities arising from that relation. He has no right to accept passengers for transportation and bind the defendants for their safe carriage, and every man may safely be presumed to know thus much.

If the risk is much greater by this mode of conveyance, the plaintiff's intestate by adopting it assumed the extra risks arising therefrom, and must be held to abide the unfortunate consequences.

No one becomes a passenger except by the consent, express or implied, of the carrier. There is no allegation of express consent

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by the defendants, nor of any thing from which consent can be implied that the plaintiff's intestate should be carried at their risk by this unusual mode of conveyance.

Declaration bad.

WALTON, BARROWS, VIRGIN and LIBBEY, JJ., concurred.

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(70 Me. 74.)

Partnership—payment of individual debt out of partnership fund.

Where one partner pays his individual debt, to the knowledge of his creditors out of the funds of his insolvent firm, without the assent of his copartners, the money may be attached by a creditor of the firm. (*See note, p. 306.*)

ACTION on note; trustee process against Belfast National Bank.
The opinion states the facts.

W. H. Folger, for plaintiffs.

J. Williamson, for trustee.

PETERS, J. The bank (alleged trustee) held a note against Woodward, one of the firm of Hersey & Woodward. The firm was insolvent. Without the knowledge or consent of his partner, Woodward drew drafts upon the copartnership funds, and passed them to the bank in payment of his individual note. The bank knew that it was a misapplication of the funds of the firm, as the papers were *per se* a perfect notice of the fact. A creditor of the firm has sued the partners upon a firm debt, and trusted the bank for the sums thus paid on Woodward's private note. Can the attachment be sustained? We think it can.

One side of the question is, that the creditors can have no legal remedy because the partnership has none; that one partner has the power to transfer the partnership property without the consent of the copartners; that by his act the title passes out of the firm and vests in the transferee, when no fraud is intended, and can be reached by creditors or partners only in equity; that there can be no legal remedy.

The other side of the question is, that the transfer of partnership property by one partner, without the consent of his copartners, to pay a private debt of his own, is a fraud upon his copartners, unless the firm has enough to pay all its debts and liabilities; that if the title in any way passes to the transferee, he holds it in trust for the benefit of the partners and not for himself; and that partnership creditors can avail themselves of this right of the partnership, in an action at law, by an attachment of the property. We hold this position to be the just and correct one.

Judge STORY declares that the private creditor can have no better title to the funds than the partner himself had, and pronounces a creditor's acceptance of them as an illegal conversion of the funds of the firm. *Rogers v. Batchelor*, 12 Pet. 221; *Hoxie v. Carr*, 1 Sumn. 181; *Kelly v. Greenleaf*, 3 Story, 93. He denominates the partners as having a lien upon the property for firm debts, and creditors of the firm as having a *quasi* lien thereon. Story Part., § 360. Lord ELDON called the partner's right an equity amounting to something like lien. *Ex parte Williams*, 11 Ves. 5. Chief Justice GIBSON describes the right thus: "The principle which enables partners to pledge to each other the joint effects as a fund for the payment of the joint debts has introduced a preference in favor of joint creditors." *Doner v. Stauffer*, 1 Penn. 198. Chancellor KENT says: "Creditors have no lien upon the partnership effects for their debts. Their equity is the equity of the partners operating to the payment of the partnership debts." 3 Kent Com. 63. It is commonly said in the cases that the preference of the creditors is "worked out" through the equity of the partners. The lien is waived if all the partners assent to or join in the sale of partnership goods to pay the debt of one partner. Kent Com. *supra*. Chancellor KENT has been supposed to favor the theory of a creditor's lien more strongly than some other other jurists have, and the New York court in a comparatively late case (*Menagh v. Whitwell*, 52 N. Y. 165; s. c., 11 Am. Rep. 683), say: "The better opinion is, at this time, in accord with the views of Chancellor KENT, that the partnership debts have in equity an inherent priority of claim to be discharged from the joint property."

The principle seems to amount to this, that the partners hold the lien for themselves and creditors. It is theirs for the benefit of their creditors. They cannot benefit themselves thereby, excepting as they confer benefit upon their creditors. It is principally

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through proceedings for the benefit of creditors that the lien is ever maintained and upheld. The lien or equity of the partners, until waived by the partners, holds the property in a condition where it can be taken by creditors. As soon as an attachment of it is made, the lien of the partners by operation of law, so to speak, becomes transferred to the creditor, putting it beyond the further control of the firm.

What need of a resort to equity in such a matter as this? The legal remedy is more expeditious and efficacious, simple and satisfactory. You may go into equity, but why be compelled to, when a proper result can be "worked out" in a more direct and cheaper way? No other creditor complains, requiring a distribution of the fund. The objection is, that it is assuming equity powers in a court of law. But a good deal of equitable remedy in partnership matters has already been imported into the law. In this respect the law in this State has been advancing, as late cases will show. *Hacker v. Johnson*, 66 Me. 21; *Parker v. Wright*, id. 393. Joint creditors have the primary claim upon the joint fund, in the distribution of the assets of partners, when in bankruptcy or insolvency. 3 Kent Com. 64. So in cases of general assignments for the benefit of creditors. *Wilson v. Robertson*, 21 N. Y. 587; *Merrill v. Wilson*, 29 Me. 58; *Howe v. Lawrence*, 9 Cush. 553.

It is rather strange that a question of such practical interest and importance as this is should not have been discussed in any reported case in this State. There is not much authority upon the question to be found elsewhere. The case of *Caldwell v. Scott*, 54 N. H. 414, is, however, in point, and coincides with our view. *Arnold v. Brown*, 24 Pick. 89, indirectly decides the question, we think, the same way. *Locke v. Lewis*, by implication, admits the principle. 124 Mass. 1; s. c., 26 Am. Rep. 631. Other cases are more or less to the same effect. *Williams v. Brimhall*, 13 Gray, 462; *Tay v. Ladd*, 15 id. 296; *Commercial Bank v. Wilkins*, 9 Me. 28; *Yale v. Yale*, 13 Conn. 185; *Welles v. March*, 30 N. Y. 344; *French v. Lovejoy*, 12 N. H. 458; *Homer v. Wood*, 11 Cush. 62. In the case last cited it was held that partners could not jointly sue to recover a debt which one of the partners had released in payment of his own individual indebtedness. The decision is upon the ground that one of the plaintiffs was equally with the defendant guilty of the fraud.

In the case at bar no such difficulty about the joinder of par-

ties is encountered. We also avoid the question whether it makes a difference that the private creditor does not know that he is receiving partnership funds. Upon this point the authorities disagree. *Locke v. Lewis, supra*; *Rogers v. Batchelor, supra*; *Ferson v. Monroe*, 21 N. H. 221; *Geery v. Cockcroft*, 33 N. Y. Sup. Ct. 146, and cases cited. Another question has been mooted, not arising here, and that is whether an action may be sustained in the name of one partner alone where the copartner and another person have jointly committed a fraud upon the partnership. It has been decided that it cannot be (*Wells v. Mitchell*, 1 Ired. Law, 484; *Miller v. Price*, 20 Wis. 117), and under some circumstances, that it can. *Calkins v. Smith*, 48 N. Y. 614; s. c., 8 Am. Rep. 575.

No other points raised can change the result.

Trustees charged for \$500.

APPLETON, C. J., WALTON, BARBOWS, DANFORTH and LIBBEY, JJ., concurred.

NOTE BY THE REPORTER.—To same effect, *Phelps v. McMeely*, 66 Mo. 554; s. c., 37 Am. Rep. 378; *Cotzhausen v. Judd*, 43 Wis. 313; s. c., 28 Am. Rep. 539. Compare *Schmidlap v. Currie*, 55 Miss. 597; s. c., 30 Am. Rep. 530.

In *Davis v. Howell*, N. J. Ch., Oct. 1880, a firm made an assignment for the benefit of their creditors, after which each partner made an assignment for the benefit of his creditors. The firm estate was sufficient to pay only eleven per cent of the firm indebtedness. Held, that the creditors of the firm could not resort for the deficiency to the individual estate of either partner until the individual creditors of such partner were satisfied. The court said:

"The question presented has been often discussed, and though there exists some contrariety of judicial determination upon it, must be considered as settled by the great weight of authority. The rule is laid down in the text-books that joint debts are entitled to priority of payment out of the joint estate, and separate debts out of the separate estate. Story's Eq. Jur., § 675; Snell's Prin. of Eq. 419; Story on Part., § 376; Kent's Com. 64, 65; Pars on Part. 480. And though the propriety of the rule has been often and persistently questioned on the ground that it is a violation of principle, and devoid of equity, and was originally adopted from considerations of convenience only, and in bankruptcy cases, and not on principles of general equity, yet it is so firmly established that it must be regarded as a fixed rule of equity. Its history is so well known, and has been so often stated, that it is profitless to repeat it. It was declared in 1715, in *Ex parte Crowder*, 2 Vern. 706; it was affirmed by Lord HARDWICKE, and though Lord THURLOW refused to follow it, it was restored by Lord LOVENBOROUGH and followed by Lord ELDON, and it has existed ever since in the English chancery. It has an exception where there is no joint estate and no solvent partner. But where there is any joint estate the rule is to be applied. That part of the rule which gives the joint creditors a preference upon the joint estate has been repeatedly recognized in this State. *Cammack v. Johnson*, 1 Gr. Ch. 163; *Mallack v. James*, 2 Bea. 126; *Mittnacht v. Smith*, 2 C. E. Gr. 259; *Scully v. Alter*, 1 Harr. 147; *Curtis v. Hollingshead*, 2 Gr. 402; *Brannon v. Blissett*, 1 Zab. 46; *Linford v. Linford*, 4 Dutch. 113. In *Scully v. Alter* the Supreme Court recognized the rule in all its parts. Chief Justice HORNBLLOWER, by whom the opinion of the court was delivered (the question arose under an assignment under the Assignment Act, and was the same as is presented in this case), said: But if it is an assignment not only of the partnership effects and property of the firm of Carhart and Britton, but also an individual and several assignment by them of

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their respective and several estates, then it must be treated as such. The estates and debts must be marshalled; the partnership effects applied in the first instance to the partnership debts; the effects of Carhart applied in the first instance to the payment of his separate debts, and in like manner the effects of Britton to the payment of debts due from him individually.

"In Connecticut the rule is not followed, and that part of it which gives the separate creditors a preference upon the separate estate has been repudiated. *Camp v. Grant*, 21 Conn. 41. It has been repudiated also in certain other States. *Bardwell v. Perry*, 19 Vt. 222; *Emanuel v. Bird*, 19 Ala. 596. But the doctrine is recognized elsewhere, and has been established after thorough discussion and careful consideration. In *Wilder v. Keeler*, 3 Pal. 167, Chancellor WALWORTH, after a full discussion of the subject, gives the sanction of his weighty opinion to the rule as a doctrine of equity. He says: 'In the case now under consideration there was at the death of G. F. Lush a large joint fund belonging to the partnership, out of which the joint creditors were entitled to a priority of payment, and out of which several of the joint creditors who have come in under this decree have actually secured a portion of their debts. Nothing but an unbending rule of law should, under such circumstances, induce the court to permit them to come in for the residue of their debts, ratably, with the separate creditors. The amount of the fund which will remain after paying the separate creditors, being a fund which could not be reached at law by the joint creditors whose remedy survived against the surviving partner alone, must be considered in the nature of equitable assets, and must be distributed among the joint creditors, upon the principle of this court that equality is equity.' The doctrine was recognized in *Morgan v. Skidmore*, 55 Barb. 263. In Pennsylvania, in *Bell v. Newman*, 5 S. & R. 73, 91, 92, GIBSON (afterward chief justice), in a dissenting opinion, strongly supports the rule as one founded on the most substantial justice. In *Black's Appeal*, 44 Penn. St. 503, and again in *McCormack's Appeal*, 55 id. 252, the doctrine is completely recognized and affirmed. In South Carolina, in *Woddrop v. Price*, 3 Desauss. 203; *Tunno v. Trezevant*, 2 id. 264, and *Hall v. Hall*, 2 McCord's Ch. 369, the doctrine was held to be a doctrine of equity. In Massachusetts it is established by statute. In *Murrill v. Neill*, 8 How. 414, it is recognized by the Supreme Court of the United States.

"The objection that is always pressed as the conclusive argument against it is, that partnership debts are several as well as joint, and it is urged that therefore the partnership creditor has an equal claim upon the individual estate with the separate creditor. But it is beyond dispute that in equity the former has a preferred claim upon the partnership estate. To accord to him an equal claim as to the balance of his debt which the partnership assets may not be sufficient to satisfy with the individual creditor, would be to give him an advantage to which he is not equitably entitled. If he obtains a legal lien on the separate estate he will not be deprived of it. *Wisham v. Lippincott*, 1 Stockt. 353; *Randolph v. Daly*, 1 C. E. Gr. 313; *National Bank v. Sprague*, 5 id. 13; *Howell v. Teel*, 2 Stew. Eq. 490. But if he has no such lien and the assets are to be marshalled in equity, that same equitable doctrine by which the partnership assets are devoted in the first place to the payment of his debt to the exclusion of the separate creditor, and to which he is indebted for the preference, will, in like manner and for like reason, give the latter preference upon the separate property. Such was the view of Chancellor KENT. He says: 'So far as the partnership property has been acquired by means of partnership debts, those debts have in equity a priority of claim to be discharged, and the separate creditors are only entitled in equity to such payment from the surplus of the joint fund after satisfaction of the joint debts. The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners after payment of the separate debts. It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner.' 3 Kent Com. 64, 65. The obvious infirmity of the objection to the rule is that it leaves out of consideration the fact that it is to equity that the joint creditor is indebted for his preference. It is also urged that instead of the rule it would be more equitable to require the joint creditor to have recourse to the partnership property before allowing him to participate in the separate estate, on the equitable ground that he has two funds for the payment of his debt while the separate

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creditor has but one; but the rule as established is a rule of justice and equity. It has for its basis the presumption that joint debts have been contracted on the credit of the joint estate, and separate debts on that of the separate estate. It has the weight of great authority and long establishment, notwithstanding persistent objection and some fluctuation, and it is based on equitable principles. Sound policy is in its favor. Though there may be, as there are in case of all such rules, instances in which it works unsatisfactorily, yet that on the whole and as a rule it has not operated unjustly is evidenced by the fact that it has existed so long (*Ex parte Crowder* was decided in 1715), notwithstanding opposition, and that in Massachusetts at least it has, in the face of the opposition referred to, been established by legislative authority, and that too as lately as 1838. In this State it has, as has been shown, the sanction of our judicial tribunals, and it is too firmly established to be disturbed. It is true that in *Wishaw v. Lippincott*, 1 Stockt. 353, 355, the chancellor expressed strong doubt of its correctness as a general rule; but in the other cases before cited, both previous and subsequent, the rule has been recognized without any expression of disapprobation or dissatisfaction."

WRIGHT V. ANDREWS.

(70 Me. 68.)

Negotiable instrument — indorser secured by pledge — notice.

An indorser, fully secured by money expressly pledged and appropriated for the payment of the note, is not entitled to notice of non-payment.

ACTION against surety on a note executed and delivered in Massachusetts. The opinion states the facts. The plaintiff had judgment below.

James Wright, pro. se.

D. D. Stewart, for defendant.

DANFORTH, J. The note in suit in this case, is evidence of a contract made in Massachusetts by parties residing there, and so far as appears to be performed there. Hence it must be construed in accordance with the laws of that Commonwealth. The defendants signed the note upon the back in blank.

The case finds that at the time the note was executed and delivered there was in force in Massachusetts a statute of the following tenor: "All persons becoming parties to promissory notes payable on time by a signature in blank on the back thereof, shall be entitled to notice of the non-payment thereof the same as in-

dorsers." It will be noticed that this statute does not require a demand of the maker, but simply a notice of non-payment; which as the case finds was not seasonably given.

It is suggested in the argument that under the statute a notice to a party whose signature is upon the back of the note in blank is in all cases required, and that therefore its omission in this case is fatal to the maintenance of the action. It is true that no exceptions in express terms are made in the statute. But the notice required is such and only such as indorsers would be entitled to. If then the facts are such as would excuse notice to an indorser, the same facts must necessarily excuse notice to a promisor signing as these defendants did. The necessity of notice to an indorser depends upon the contract, which may be express or implied, so notice to a surety "the same as an indorser" must in a like manner depend upon such contract as may be made by the parties or inferred from the facts. It cannot be required in the latter case, if under the same circumstances it would not be in the former.

The main question then involved in this case is whether upon the facts found by the justice presiding the defendants were entitled to notice of the non-payment of the note.

Whatever conflict there may be in the decisions of different courts in regard to the necessity of notice to an indorser who has security for his liability as such, there appears to be none, when the property pledged for such indemnity is appropriated to, and the indorser is authorized by the contract to use it for the payment of the note. In such case it is very clear that notice may be dispensed with. By such appropriation there is a trust reposed in the indorser, and by his acceptance of it an implied promise on his part that such trust shall be faithfully performed. In a certain sense the indorser becomes original promisor and assumes the place of the maker of the note. He therefore suffers no injury from the fact that he is not notified of the omission of an act which fidelity to the principal, as well as to the payee, required him to perform. *Story Prom. Notes*, § 281; *Red. & Big. Lead. Cas.* 467; *Haskell v. Boardman*, 8 Allen, 38, 41; *Ray v. Smith*, 17 Wall. 411, 416.

In this case the presiding justice found that at the time the defendants indorsed the note as sureties "they were fully secured for all liability assumed by them as such." This security appears to have been a bank book showing a deposit in a savings bank, in the name of the maker's wife. Subsequently, as the case finds,

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one of the defendants went with the wife and got the money out of the bank, "to be appropriated in payment of the note." This appears to have been done with the consent of both husband and wife. Hence whatever may have been the effect of the original security the subsequent appropriation brings the plaintiff's case within the principles of undisputed law. That this took place after the maturity of the note is not material, for it was not only a waiver of any release which might have accrued to the surety, but was a confirmation of the original pledge, and the appropriation after the maturity can be no less effectual but rather more so than if made before. The implied promise would rather be strengthened, for the inference is that both maker and surety at that time looked to that fund as the sole means of paying the note. Nor does the fact that the surety paid the money to the maker of the note for a purpose of his own, change the result; for when that purpose failed of its accomplishment, the money was returned and now remains with the defendants, as we may well infer, to carry out the original design. Whether the money belongs to the husband or wife there seems to be no reason why the defendants should withhold it from the payment of the note to which it was appropriated with the consent of both, and which consent so far as appears has never been withdrawn.

Exceptions overruled.

APPLETON, C. J., WALTON, BARROWS and LIEBEX, JJ., concurred.

THOMS V. DINGLEY.

(70 Me. 100.)

Damages — measure of — warranty.

The defendants, manufacturers of carriage springs, sold to the plaintiffs, manufacturers of carriages, carriage springs to be used by the plaintiffs in carriages to be manufactured by them, and warranted them. Some of the springs being placed in the carriages and proving defective, *held*, that the defendants were liable to the plaintiffs for the expense of renewing them and applying them.*

* See *Harris v. Watts* (51 Vt. 481), 31 Am. Rep. 604.

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ACTION for breach of warranty. The opinion states the facts. The plaintiff had judgment below, and appealed.

J. Varney, for plaintiffs.

L. Clay, for defendants.

PETERS, J. The defendants, manufacturers and vendors of carriage springs, sold to the plaintiffs, carriage builders, six carriage springs, knowing that the plaintiffs were to use them in the construction of carriages, and warranted them as made of the best of steel. They turned out to be of poor material, and unfit for the purpose for which they were intended and used. In this action on the warranty, the plaintiffs claim to recover, having declared therefor specially, the expenses to them of taking out of the carriages into which they were placed some of the defective springs and fitting new ones in place of them.

The common doctrine applicable to all cases is, that the damages shall be the natural and proximate consequence of the act complained of. They are general damages when the necessary and natural consequence. If they are the natural but not the necessary consequence of the act complained of, then they are special damages, and must be specially set forth in the declaration. *Furlong v. Polleys*, 30 Me. 491, and the cases there cited. This is an ancient and very general doctrine. The difficulty is to determine when cases fall within and when without the definition. That must often be settled by other rules of a more definite character. There must be rules within the rule. In the growth and advancement of the law, rules have been adopted to meet the necessity.

Ordinarily, the measure of damages applying to warranty of personal property is the difference between the actual value of the articles sold and what they would have been worth if as warranted. *Wright v. Roach*, 57 Me. 600. But this is not an invariable standard. It is not always adequate to produce just results. There are cases where more extended damages are recoverable for special or consequential or exceptional losses.

The rule that embraces cases of special damages is the one formulated in the case of *Hadley v. Baxendale*, 9 Exch. 353. ALDERSON, B., there said: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract, should be either

such as may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and were thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of the contract under those special circumstances so known and communicated." More could profitably be quoted from the case, if space permitted.

The principles laid down in *Hadley v. Bazendale*, have been applied in many cases, and in the main been approved by many courts. In *Griffin v. Colver*, 16 N. Y. 489, in discussing the English case, SELDEN, J., observes that "the damages must be certain, both in their nature and in respect to the cause from which they proceed." In our own State any rule giving uncertain and speculative damages has been uniformly rejected. Damages have not been allowed which consisted of profits expected to arise out of collateral or independent contracts, nor for losses accidentally occasioned or supposed to be occasioned in one's business or affairs. *Bridges v. Stickney*, 38 Me. 361; *Frye v. Railroad*, 67 id. 414. For this reason, the court, in *Freeman v. Morey*, 41 id. 588 (a case in contract and not of tort), refused to allow for the loss of the use of a mill in process of construction, for which defendant neglected to furnish such mill-irons as he had contracted to deliver. Whether the plaintiff in that case would have finished his mill and profitably used or rented it was regarded as a matter of uncertainty. It was undoubtedly the belief of the court that such a liability was not within the intention of the parties when the contract was entered into, and that the consideration for such a risk would have been inadequate.

The New York cases, following the lead of *Hadley v. Bazendale*, have a tendency to require that in contracts the damages shall be such as arise naturally in the usual course of things, and at the same time be such as must have been contemplated by the parties. Our own cases seem to affirm the same thing. Mr. Sedgwick (Damages, 6th ed., 81), thinks there may be cases of damages contemplated by the parties that would not be regarded as arising

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naturally. But that could seldom, if ever, occur. Parties could hardly be supposed to contemplate damages that could not naturally arise, without making some express provision in relation to them. And what would appear at one standpoint as indirect or remote damages, may appear differently in the light of all the circumstances attending the contract when it is made. However that may be, and whether accepted in its wider or narrower limits, we think the case at bar easily falls within the rule.

Upon the principle laid down in *Hadley v. Bazendale*, it is in many cases, and we think correctly, held that where manufactured articles are ordered for a special purpose known to the seller, there is an implied warranty that they are reasonably fit and suitable for the purpose for which they are ordered, and the vendee may recover for the breach of warranty such damages as may be reasonably supposed to have been in the minds of the parties in respect to it. *French v. Vining*, 102 Mass. 132; s. c., 3 Am. Rep. 440; *Bradley v. Rea*, 14 Allen, 20; *Howard v. Emerson*, 110 Mass. 320; s. c., 14 Am. Rep. 608; Field Dam., § 277; Sedgw. Meas. Dam. (6th ed.), 353, note; Para. Cont., Title, Warranty. So in the present case, the warranty that the articles were of sound steel must, under the circumstances, bear the construction that the parties intended a warranty that they were suitable and fit for the particular use for which they were ordered and sold. The defendants knew, or assumed to know, of what quality of material the articles were constructed, and by their warranty relieved the plaintiffs from the necessity of personal inspection and risk.

The case of *Miller v. Mariner's Church*, 7 Me. 51, is, in this respect, to the same effect as *Hadley v. Bazendale*, although decided a quarter of a century before the latter case. There the question was, what damages were recoverable for the failure to deliver some stones at the date contracted to be delivered, the contractee purchasing them to use in the construction of a building in process of erection. The general rule was given to the jury, that the damages would be no more than the contractee had or would have sustained by proceeding with due diligence, upon the failure of the contractor to perform his contract, to furnish himself with the same materials elsewhere. But the contractee was permitted to recover damages for the necessary delay, as well as for the additional price occasioned by the default of the other party, the delay involving the loss of labor, if not the loss of rents. Other cases in this State present

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somewhat similar decisions. *True v. Telegraph Co.*, 60 Me. 9; s.c., 11 Am. Rep. 156; *Bartlett v. Telegraph Co.*, 62 Me. 209; s. c., 16 Am. Rep. 437; *Grindle v. Express Co.*, 67 Me. 317. See Massachusetts cases. *Bartlett v. Blanchard*, 13 Gray, 429; *Derry v. Flitner*, 118 Mass. 131.

Special damages are to be cautiously admitted. They cannot always be rejected. In this case, we think it not unreasonable to allow the actual cost of replacing the carriage springs, if the facts are as the plaintiffs assert them to be. Although such damages are special or consequential, they are not liable to the objection of being uncertain or speculative or remote. They are such as were contemplated by the parties.

Exceptions sustained.

APPLETON, C. J., BARROWS, DANFORTH, VIRGIN and SYMONDS, JJ., concurred.

DUNHAM V. BOSTON & MAINE RAILROAD COMPANY.

(70 Me. 164.)

Carrier — forwarder — delay — regulations.

A railroad company receiving goods from a connecting railway for carriage, unaccompanied by any bill of back charges, must forward them forthwith, notwithstanding its rule is to require such bill before forwarding.

ACTION of damages for delay in carriage. The opinion states the facts.

H. L. Mitchell, for plaintiff.

Wilson & Woodard, for defendants, cited *Walls v. Bailey*, 49 N. Y. 464; *St. John v. Van Santvoord*, 6 Hill, 157; *Farmers & Mechanics' Bank v. Champlain Trans. Co.*, 23 Vt. 186; *Williams v. Gilman*, 3 Me. 276; 1 Greenl. Ev., §§ 292, 294; 2 Redf. Railw. (5th ed.), § 184; *Judson v. Western R. Corp.*, 4 Allen, 520, 526; *Briggs v. Boston & L. R. R. Co.*, 6 id. 246; Story on Bail, § 532; *Bowler v. E. & N. A. Railway Co.*, 67 Me. 395; *Stevens v. Boston & Worc. R. R. Co.*, 8 Gray, 262, 266.

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APPLETON, C. J. The defendants, on July 1, 1876, received from the Fitchburg Railroad Company certain goods consigned to the plaintiff at Bangor, with a memorandum stating from whom received and to whom and where to be delivered, but the Fitchburg company neglected or omitted from carelessness to furnish the defendant with the amount of precedent freight earned.

The defendants received the goods, and on the third or fourth of July carried them to Portland, where they remained until July 12, when, having received a bill of all previous freight earned, they delivered the goods to the Maine Central railroad, which corporation took them to their place of destination and delivered them to the consignee.

The plaintiff, in consequence of the delay in transportation, lost the sale of his goods, and brings this action to obtain compensation for such loss.

The acceptance by the defendants of the goods at Portland was complete when the goods by their consent came into their hands. *Pratt v. Railway Co.*, 95 U. S. 43.

The defendants receiving the goods and taking them to Portland, in so doing were common carriers and liable as such.

But as the goods were to be delivered at a point beyond their line, and as they knew where and to whom they were to be delivered, they were thus to be regarded as forwarders, and it became their duty to forward the goods without unnecessary delay. *Plantation No. 4 v. Hall*, 61 Me. 517; *Rawson v. Holland*, 59 N. Y. 611; s. c., 17 Am. Rep. 394; *Burroughs v. N. & W. R. R. Co.*, 100 Mass. 26; s. c., 1 Am. Rep. 78.

The defendants manifestly neglected their duty as forwarders. For so doing they rely upon an established rule of the Maine Central Railroad Company, which is not "to receive goods from connecting lines to be forwarded unless such goods are accompanied by a regular way-bill or memorandum giving name of consignee, destination and charges due."

But this rule, if proved, cannot avail, because they did in fact receive the goods and carry them part way, and thus receiving them and transporting them they were bound to forward.

While the defendants claim all the rights of common carriers they must discharge all the duties of such carriers. Railroads may make arrangements for mutual accommodation. They may

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have the merit of convenience, but they have not the force of law. They are not obligatory on the public.

It is claimed that they are to be excused because the antecedent charges for freight had not been delivered and they could not collect the freight earned. But that is no excuse. That the Fitchburg Railroad Company neglected to furnish the amount of freight, so that they were unable to state the amount of precedent freight and collect it, is no excuse for not forwarding the goods in their possession.

But they would not be responsible for its collection if the negligence of the Fitchburg Railroad Company prevented their having the necessary information to enable them to make such collection. They should not suffer for the negligence of others for whose acts they are not responsible. They could forward the goods with their own bill for freight earned by them.

But the defendants having received and carried the goods were bound to deliver them to the next railroad. In *Reynolds v. B. & A. R. R. Co.*, 121 Mass. 291, the defendants refused to receive the goods because there was no freight bill and expense voucher. In the present case the defendants did receive and transport over their line, but neglected to forward. They cannot deny that they had the custody of the goods as carriers; that they were responsible as such carriers over their road; that when the goods reached its terminus their liability as carriers had terminated and a new duty as forwarders had arisen, which they neglected to discharge.

But the defendants are not justified in the delay in this case by the evidence upon which reliance is placed. Hartwell, the general freight agent of the Fitchburg railroad, and Kenney, the general freight agent of the defendant company, agree that in cases where the regular way-bill is not delivered on the same day as the freight, the custom of both railroads "is to receive the freight with the memorandum and send it forward at once, and afterward, as soon as received, sending on the regular way-bill." Neither witness states that the road receiving the freight with the memorandum is to retain it till the way-bill is received, or that the freight received is subject to the further order of the road delivering it until the way-bill is forwarded. If it were so, the road receiving the freight might be compelled to hold it against the will of the owner until the road delivering the freight should see fit to deliver the way-bill. This would make the subsequent carriage of goods

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depend upon the action of the railroad delivering, and their carriage might be delayed indefinitely.

What the defendant corporation should have done, and what it did not do, was to deliver the freight with their own charges only, and the memorandum stating the place where and the person to whom the freight was to be forwarded, to the next line of railroad over which the goods were to be transported. If the Fitchburg railroad should not forward their freight bill in a reasonable time, so that the defendants could collect the freight, they would not be responsible for it. The loss would be the result of negligence on the part of the Fitchburg railroad, which that corporation could not and should not impose on these defendants.

But it has been urged that the Maine Central Railroad Company would not have received the goods without a way-bill giving the charges due. They were not tendered for transportation, therefore it cannot be known that they would not have carried them to their place of destination.

But why should not the Maine Central railroad have taken and carried the goods? It seems from the testimony of their freight agent they were accustomed to forward freight though the regular way-bill showing charges was not delivered on the same day with the freight.

Again, it was the duty of the Maine Central railroad as common carriers to receive and transport the freight. The defendants had the goods to forward, and it was nothing to the Maine Central railroad that the Fitchburg railroad, or some preceding railroad on the route, had neglected their duty. The Maine Central would not be liable for precedent freight earned, of which they had no notice. Indeed, they might assume, that if no charges were made known to them, it was because none whatever existed. They would have no right to refuse goods tendered for carriage.

Where goods are delivered to a railroad company by a connecting railroad company to be transported to the owners, and the same are received by said company for the purpose, it becomes its duty to send them off immediately; and it cannot justify the detention of the goods on the ground, that by its regulations, goods received from a connecting road are not to be forwarded until the receipt of a bill of back charges, and that no such bill accompanied the goods. *Michals v. N. Y. Cent. R. R. Co.*, 30 N. Y. 564. This case determines the precise question under consideration.

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In the case of transporting goods over several railroads constituting a connecting line, neither company is an agent of the owner; each exercises an independent employment as a contractor with the owner, and is responsible for its own negligence, and it cannot make the owner responsible for the negligence of a connecting road. *Sherman v. Hudson R. R. Co.*, 64 N. Y. 255.

Here the defendants' only excuse is the negligence of another railroad, and that, too, when they had all the information needed for the discharge of their own duty. The convenience of the public must have precedence. It is not just that goods consigned should be lost or diminished in value at the cost of the consignee, thereby to exonerate a railroad company from the consequences of its own negligence, still less to exonerate another railroad from the consequences of its negligence. The defendants should have discharged their known duty, whether the Fitchburg company did theirs or not. They should have tendered the goods received with the memorandum to the Maine Central Railroad Company for transportation, and then they would have fulfilled the legal obligation resting upon them. If the Maine Central railroad had refused to receive and transport, it would then remain to be seen by what right they could refuse goods tendered for transportation so long as they claim to be common carriers.

The measure of damages is the difference in the value of the articles (which should have been forwarded) at the time and place when and where they ought to have been delivered and when they were actually delivered. *Ward v. N. Y. Cen. R. R. Co.*, 47 N. Y. 329 ; s. c., 7 Am. Rep. 405

Defendants defaulted.

WALTON, BARROWS, VIRGIN and LIBBEY, JJ., concurred.

DAVIS v. DUDLEY ; SHAW v. DUDLEY ; DUDLEY v. SHAW.

(70 Me. 236.)

Infancy — deed — avoidance — estoppel.

A minor's deed of lands is binding upon him, if after arriving at majority, he knowingly suffers the grantee to make valuable improvements on the premises, without announcing his intention to avoid the deed.*

* To same effect *Gillespie v. Bailey* (12 W. Va. 70), 29 Am. Rep. 445.

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ACTION to recover real estate. The opinion states the case.

L. R. King, for Shaw and Davis.

Powers & Powers, for Dudleys.

DANFORTH, J. The last named of these three cases, that of *Dudley v. Shaw*, is a real action. It is conceded that the title to the land described in the writ was originally in the plaintiff. The tenants claim under a deed from him. The execution of the deed is not denied, but the case finds that when it was given the grantor was a minor. The deed is dated November 27, 1868, and the plaintiff became of age April 17, following. On the 22d day of April, 1878, the plaintiff entered upon the land claiming to own it. After the sale and before this entry the tenants had built buildings thereon and made valuable improvements, the plaintiff living near by and making no claim to the land or objection to the improvements. The only question involved in the case is whether under these circumstances the deed is valid and binding upon the plaintiff.

Whatever differences of opinion may formerly have existed as to whether a minor's deed is void or only voidable, it must now be considered as well settled law that an instrument like this, where it does not appear upon its face to be prejudicial and which may be beneficial to the minor, is voidable at his election. *Robinson v. Weeks*, 56 Me. 106.

As the deed is voidable at the election of the minor, it follows that until that election is in some way made manifest there is neither a ratification nor an avoidance. Without the one or the other the deed must still remain in force but as a defeasible instrument. This manifestation must be shown by some positive and clear act, intended for that purpose. What that act shall be, or what is sufficient for that purpose must necessarily depend upon the circumstances of each case. It therefore follows that mere delay within the time allowed by the statute of limitations, uncoupled with any acts expressive of an intent to confirm, would not be sufficient for that purpose; and this may now be considered as well settled law; though some decisions may be found holding that unless the deed is repudiated within a reasonable time, ratification will result. 3 Wash. Real Prop. (3d ed.) 226; *Boody v. McKenney*, 23 Me. 523-4; *Jackson v. Carpenter*, 11 Johns. 539; *Tucker v. McCreland*, 10 Pet. 75-6.

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While mere acquiescence for any length of time within the statute of limitations, is no proof of intention to ratify, when coupled with acts or even omissions when duty requires action, it may become not only pertinent, but satisfactory proof of such intention.

In *Boody v. McKenney*, SHEPLEY, C. J., says: "The reason is, that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty toward others to act speedily."

In *Tucker v. Moreland*, STORY, J., says: "Mere acquiescence uncoupled with any acts demonstrative of any intent to confirm it would be insufficient for that purpose."

From these propositions the inference is inevitable that when delay is coupled with acts, indicating intention to confirm, or which do cause injury to others, or secure benefits to himself, or under such circumstances as impose a duty to act speedily, it becomes proof of confirmation more or less potent according to the accompanying acts and circumstances.

This is analogous to the doctrine applied to infant purchasers. If he retains the land after becoming of age, receiving a benefit from it, he confirms the contract without further act. *Hubbard v. Cummings*, 1 Me. 11; *Dana v. Coombs*, 6 id. 89. Without a further citation of authorities it seems to be established as a general rule that when an infant enters into a contract and after becoming of age receives a benefit from it or by virtue of it does an act which is an injury to the other party, he thereby ratifies it.

In this case the land was sold late in the fall. The grantor became of age in the spring following. The inference is that nearly or quite all the improvements were made at a time when the duties and responsibilities of an adult rested upon the plaintiff. The case further shows that his residence was such that he must have known the improvements the tenants were making, the purpose for which they were made, and that they were made relying upon the title derived from the deed now in question. Under such circumstances if the plaintiff intended to avoid his deed, common honesty required him to make known that intention in season to prevent so great an injury and would forbid his making profit by an omission to do so. This certainly is a case where there is something "to urge him as a duty toward others to act speedily." Surely he was required to act within a reasonable time and failing to do so he must now be considered as electing to abide by his

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deed. The tenants might fairly suppose that he so intended, as they were under no obligation to assume that he would act in violation of that rule of law which requires honesty in minors especially after minority has ceased. While then mere delay has no effect of itself, under the circumstances of this case, it became demonstrative proof of an intent to confirm, and certainly as unreasonable in its length and similar in effect as causing loss to the party bound, as well as profit to the party whose duty it was to act, as if the minor had been the purchaser of the land in possession, instead of the seller. In which case it is clear he would have been held as confirming the deed. *Boody v. McKeen*, *supra*, 1 Am. Lead. Cas. 258.

This would seem to be a case coming within the meaning of the language used by BARROWS, J., in *Robinson v. Weeks*, where he says contracts which may be avoided by the minor include "all executed contracts of this sort where the other party can be placed substantially in *statu quo*." It is undoubtedly true that the consideration received may not necessarily be returned, for that may have been expended or squandered before the minor becomes of mature age. Nor will he be held responsible for his acts while under age. But in this case the acts or omissions were not those of a minor, but such as he is responsible for, and from the consequences of which he cannot, or does not, propose to relieve the other party.

It is, however, claimed that sufficient relief and all that the tenants are entitled to may be obtained under the statute providing that in certain cases a tenant may in a real action recover compensation for his improvements, and there is a provision in the report that if the action "is maintainable it is to stand for hearing on the question of betterments." This leaves that question open to be contested by the plaintiff, and it is not clear that he might not do so with success. Six years' adverse possession appears to be necessary to give the tenant a right to such a claim. *Moore v. Moore*, 61 Me. 420; *Bent v. Weeks*, 46 id. 524. It is not easy to see how such a possession can be shown here. The tenants were in possession not as disseizors of the plaintiff, but by virtue of a title under him; defeasible it may be, but nevertheless a title by a deed valid until defeated within a proper time and under proper circumstances. R. S., ch. 104, § 32.

The case of *Tolman v. Sparhawk*, 5 Metc. 469, relied upon by

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the plaintiff, differs materially from this. In that the improvements were made upon a strip of land between the true line and a conventional one. The latter was established by an agreement of the parties, and was afterward shown to have been a mistaken one. Hence the tenant had no title to the land, and although he was holding under an assent of the plaintiff, that assent was but oral and given under a mistake. Therefore the tenant was holding not only without title, but in opposition to the true title, and the plaintiff, as well as the tenant, being in ignorance of the true line, no obligation rested upon him to inform the tenant of his mistake. Therefore it was properly decided in that case that there was no estoppel on the part of the plaintiff, and the betterment act would work that justice between the parties which the law contemplates.

But if we assume that the tenants are in this action entitled to a compensation for their improvements the principle remains the same. There is still an injury to them as well as a benefit to the plaintiff sufficient to distinguish this case from those which hold that mere delay is not a ratification of the deed. It surely is an injury to a party, after having made for himself a home, to be obliged, without fault on his part, to sell it upon compulsion at the election of one who is in fault, at a price fixed by other parties and after paying the costs of a suit to have that price determined, or be compelled under the same liability of costs to pay such sum for the land as the judgment of the same persons may dictate. It is too of some benefit to the plaintiff, or may be so, that he can at his election take the improvements or sell his land at the price assessed.

Besides if the tenants are entitled to a compensation as a condition precedent to an avoidance of the deed, as would seem to be unquestioned and unquestionable, that compensation should be made or tendered before the commencement of the action. The plaintiff must be entitled to recover when he begins his suit or he must fail. He can recover, if at all, only on the ground that the deed has been made void, and in order to do this he must perform all things incumbent upon him to do for that purpose. In this case there has been neither a performance nor a tender of it.

If, under these circumstances, the plaintiff can recover, the protection, which the law furnished him as a shield, has in his hands become a sword, a reproach to which we think the law is not open, and there must be judgment for the defendant.

This result necessarily disposes of the other actions. As the

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entry of the defendants, which is the alleged trespass in each, was unauthorized the actions are maintainable, and as provided in the report, judgment must be entered for the plaintiff in each case.

Judgment accordingly.

APPLETON, C. J., BARROWS, VIRGIN, PETERS and SYMONDS, JJ., concurred.

SAWYER V. GERRISH.

(70 Me. 354.)

Contract — lien on future increase of animals.

Plaintiff's mare having been served by defendant's stallion, plaintiff executed a written agreement to pay defendant twenty dollars in twelve months if the mare proved with foal, "colt holden for payment." Held, that the agreement was a mortgage of the colt.

REPLEVIN for a colt. On the 24th day of August, A. D. 1874, Elisha Sawyer, plaintiff's intestate, had his mare served by defendant's stallion, and gave to defendant his promissory note, as follows:

"August 24, 1874.

"Twelve months after date I promise to pay to the order of Albert Gerrish, or bearer, if my mare prove with foal, twenty dollars, value received, use of horse Mohawk. Colt holden for payment. If mare is disposed of, considered with foal.

"ELISHA SAWYER."

The following season said mare was delivered of a foal, the product of that service. The note was never paid. In the fall of 1878 defendant took possession of the colt, claiming a lien upon it until the note and expenses of keeping were paid. It was agreed in this action that if the defendant's lien was valid plaintiff was to become nonsuit and judgment to be ordered for a return.

F. Hamblen, for plaintiff.

C. A. Bailey, for defendant.

VIRGIN, J. It would seem that if the defendant had sent his mare to the plaintiff for the purpose of raising a colt from the latter's stallion, the defendant would have had, at common law, a lien upon her for the use of his horse, so long as he retained possession of the mare. *Scarfe v. Morgan*, 4 M. & W. 270; and perhaps upon the foal, since *partus sequitur ventrem*. 2 Bl. Com. 390; *Allen v. Dinmore*, 55 Me. 113. But no such question is raised here.

Neither does the case present any question of common-law lien upon the colt. The defendant on the contrary claims a contract lien upon the colt alone, by virtue of the written contract between the parties entered into after the service rendered had been completed and the colt had a potential existence.

It is well settled that the owner of personal property having a potential existence may sell it. *Grantham v. Hawley*, Hob. 132; 2 Kent Com. 468 and note g, 492 note 1, c; *Farrar v. Smith*, 64 Me. 77. And within this principle, the owner of a mare may, during gestation, sell her future offspring, which will vest in the vendee when parturition takes place. *McCarty v. Blevins*, 5 Yerg. 195.

Doubtless the plaintiff, by his written contract with the defendant, intended to give him a claim of some kind upon the foal for the service of the defendant's horse, "if the mare proved with foal," of which she "was delivered the following season," "the product of the service."

What was that intention as declared by the terms of the agreement? The agreement should receive such a construction *ut res valeat et non pereat*, provided that construction be a reasonable one.

The plaintiff owned the mare and the offspring in the absence of any sale. The defendant never owned either; but they were both the unincumbered property of the plaintiff's intestate except so far as the title of the colt was affected by the written agreement of the parties thereto. No possession, even, was ever had of the colt, by the defendant, until he took it a short time before the colt was replevied in 1878, about the time it was three years old. The case is, therefore, unlike that class of cases in which the owner parted with the possession of certain personal property, on a contract for sale, but retained the title until the price agreed on was paid.

The real transaction was simply — the plaintiff's intestate gave his promissory note to the defendant in consideration of the "use

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of" the defendant's stallion, payable "twelve months after date" provided his mare proved with foal, and gave security on the foal, for payment. The condition of the promise has been fulfilled and we think the promise should be.

Our opinion is that the contract was in the nature of a mortgage; and the case not distinguishable in principle from *Oakes v. Moore*, 24 Me. 214, 220. The result is

Plaintiff nonsuit. Judgment for return.

APPLETON, C. J., BARROWS, DANFORTH, PETERS and SYMONDS, JJ., concurred.

GOULD V. MURCH.

(70 Me. 228.)

Vendor and purchaser — destruction of buildings by fire.

Where the owner of land, with valuable buildings on it, contracts to convey it at a future day on payment of a stipulated price, secured by the purchaser's notes presently given, the purchaser presently taking possession, and the buildings are destroyed by fire, without fault of either party, before payment and conveyance, the vendee is not bound to take the land and pay the notes, but the vendor is entitled to the value of the use and occupancy during the vendee's possession.

ACTION on promissory notes. The opinion states the case.

C. L. Jones, for plaintiff.

Walton & Walton, for defendant.

LIBBEY, J. The notes in suit, with three others, were given in payment for a lot of land on which were a dwelling-house and other buildings; and on payment of the notes at maturity, the plaintiff agreed to convey the premises to the defendant. The defendant was to have possession of the premises till he made default of payment as agreed, and he entered into possession under the agreement. Within a year from that time the buildings were burnt without the fault of either party.

The question presented to the court is whether the destruction of the buildings can be set up by the defendant as a defense to the notes. We think it can be.

When the owner of a lot of land with buildings upon it agrees to convey it at a future day on payment of the purchase money by the purchaser, and before payment and conveyance the buildings are destroyed, by fire, without the fault of either party, the loss must fall upon the vendor; and if the buildings formed a material part of the value of the premises, the vendee cannot be compelled to take a deed of the land alone, and pay the purchase money; and if he has paid it he may recover it back. *Thompson v. Gould*, 20 Pick. 134, and cases there cited; *Gould v. Thompson*, 4 Metc. 224; *Wells v. Calnan*, 107 Mass. 514; s. c., 9 Am. Rep. 65.

In *Thompson v. Gould*, the authorities bearing upon the question were elaborately examined and considered, and WILDE, J., in the opinion of the court says: "In respect to the loss of personal property, under the like circumstances, the principle of law is perfectly clear and well established by all the authorities. When there is an agreement for the sale and purchase of goods and chattels, and after the agreement and before the sale is completed, the property is destroyed by casualty, the loss must be borne by the vendor, the property remaining vested in him at the time of the destruction. *Tarling v. Baxter*, 9 Dowl. & Ryl. 276; *Hinde v. Whitehouse*, ? East, 558; *Rugg v. Minett*, 11 id. 210. No reason has been given, nor can be given, why the same principle should not be applied to real estate. The principle in no respect depends upon the nature and quality of the property, and there can therefore be no distinction between personal and real estate."

In *Wells v. Calnan*, the same rule was affirmed. GRAY, J., in the opinion of the court very clearly and tersely states it as follows: "When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time; and if the owner of a house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain, any part of the purchase money."

The reasons upon which the rule is based are clearly and fully stated in the cases cited, and it is unnecessary to repeat them here.

But the use and occupation of the premises by the defendant,

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from the time the agreement for the sale and purchase was made, formed a part of the consideration for the notes ; and the plaintiff can recover in this action a sum equal to the value of the use of the premises while the defendant occupied them. *Wells v. Calnan, supra.*

In accordance with the stipulations in the report,

The action must stand for trial.

APPLETON, C. J., WALTON, BARROWS and DANFORTH, JJ., concurred.

SYMONDS, J., did not sit.

WITZLER V. COLLINS.

(70 Me. 290.)

Carrier — bill of lading — what embraced — evidence to contradict.

Owners of a vessel are responsible only for goods described in the bill of lading and delivered into the custody of the master, at the accustomed place of receipt, and evidence is incompetent to show that the bill was intended to or did include goods elsewhere.

As between the parties to a bill of lading, evidence is competent on the part of the carrier to contradict the admission in the bill that the goods are received for shipment in good order and condition.

ACTION against carrier for loss of goods. The opinion states the case. The plaintiff had judgment below.

O. D. Baker (*J. Baker* with him), for plaintiff.

L. Clay, for defendants.

DANFORTH, J. [Omitting a point of practice.] 2. The defendant's counsel seasonably objected to the admission of testimony respecting damage, or loss of goods shipped, or delivered to the defendants at any other time than September 9, 1873, the time alleged in the writ, but it was admitted by the court.

The declaration in the writ contains two counts ; but it is conceded that both are founded upon one and the same contract made on the 9th day of September, 1873, by which as is alleged "the

defendants, as common carriers by water, in consideration that the plaintiff would and did then deliver to them nineteen packages of household goods * * * undertook and promised to carry said goods safely and securely from said Boston to said Hallowell." As there is but one contract declared upon and that for the goods delivered on the specified day, it is evident that the defendants would not be liable for the loss of goods delivered at any other time, for such would be the subject of another and independent contract.

The case further shows that the plaintiff being about to remove from the city of New York to Hallowell, packed up his household effects and started them by steamer and railroad to Boston. On their arrival in Boston he then employed a truckman to take them from the depot to the defendant's boat. On the 9th of September, the truckman took what he supposed to be all the goods of the plaintiff and on delivering them at the boat took therefor the bill of lading dated on that day and which is in the case. Subsequently it was ascertained that some of the goods were missing, and on looking for them, all or a portion were found still remaining in the depot. The truckman then forwarded these goods to the boat and took therefor the bill of lading dated October 3, 1873, which is also in the case. There is evidence in the case tending to show the specific articles packed and forwarded from New York; but there is none to show what were delivered to the defendants at any time except such as is contained in the two bills of lading.

In this state of the case there would seem to be two distinct, independent contracts in relation to the carriage of the goods, and while the writ sets out the earlier, the testimony in question relates to the later.

To meet this difficulty the plaintiff, admitting that if the two lots were distinct contracts the testimony was not admissible, claims that in reality there was but one, that of September 9; "that at that time the defendants accepted and assumed the charge of all his goods, the same in quantity and quality that came from New York to Boston," that this was a question of fact for the jury and the testimony was admissible to enable them to pass upon the question of damages, if they so found the contract.

In accordance with this theory the presiding justice gave to the jury the instructions referred to in the fourth, fifth, and seventh specifications in the exceptions. If these instructions were authorized the testimony objected to was properly received. It is suffi-

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cient therefore to consider the propriety of the instructions, which may be sufficiently understood from the following extracts from the charge.

After accurately and clearly stating the delivery necessary to the defendants' assumption of their duties as common carriers in these words, "their liability commences when the goods have been delivered to the common carrier — have been delivered at the usual place set apart for the receipt of such articles — to the person appointed to receive them, to the proper servant of the carriers, if not to the carriers themselves," the presiding justice adds: "Now delivery to the carrier does not necessarily mean that the goods shall be placed actually upon the boat, or within his actual control. It means actually or constructively within his actual control. In other words, if he assumes the custody and control he assumes the charge of the goods."

Then after stating the theory of the different parties upon this question of delivery, he proceeds: "Now in reference to this first point, what goods and chattels were delivered to the defendants to be transported to Augusta on September 9, I shall submit to you as a question of fact, from the evidence in the case, what articles under the rules I have given you in reference to the delivery were put in charge of these defendants at that time? Did they at that time by any thing that they did or said, or described in this receipt, intend to assume the charge, the custody, the control of any thing more than was then open to inspection to them on the wharf, or was it then understood, and was their attention brought to other articles not in this receipt of nineteen packages, whether they were there on the wharf or elsewhere? For I instruct you that it is competent for a common carrier to receipt for articles which are not then at the usual place, and he will be bound by his receipt. If it is understood and they have been brought to his notice, and he receipts for articles not on the wharf, he will be bound by that receipt. Ordinarily it is true, and experience has shown that justice requires that the rule must be enforced, that common carriers must be bound by the amount of merchandise in their receipts."

These instructions, as they were intended, clearly gave the jury to understand that they might infer, if the evidence in their opinion justified it, that the contract relied upon not only included the goods on the defendants' wharf, but others elsewhere, wherever they might be. This was erroneous certainly as applied to this

case. The defendants were common carriers by water. Their duties as such began and ended upon the water or upon the wharf at each end of their route. A portion of these goods, as the case shows, at the time the contract was made, were in the railroad depot, or had not arrived there in their transit from New York. If therefore they had "assumed the charge" of them it would not have been as carriers, nor would their liabilities as such have attached until their arrival at their wharf.

But there is no proof of any such assumption. The only evidence of the contract set out in the writ is not contained in the bill of lading of September 9. The duties and liabilities of the defendants must rest upon that and the law applicable to it. So far as it is a contract it is not to be extended by parol testimony, and if there were any such in the case it would not be competent for the jury to infer "by any thing the parties said or did or described in the receipt" that it covered or included any goods not specified by its terms. As a written instrument its construction is a question of law and not of fact. Parol testimony, if offered, would have been competent to show what specific articles were contained in the packages mentioned in the bill of lading, but not that it embraced other packages or goods elsewhere.

By its terms it clearly included only such as at the time were actually delivered upon the wharf. In it these goods are described as "shipped," and under that description it covers and binds the defendants for no goods except such as are on the vessel or wharf, or such as shall be so delivered as and for the goods embraced in the bill of lading and before the vessel sails. *Rowley v. Bigelow*, 12 Pick. 314, 315; *The Delaware*, 14 Wall. 600, 601.

The liabilities of these defendants, if any, are as owners of the steamer and in no other way. The same contract that would bind them for the safe carriage of the goods would also bind the vessel. In the *Lady Franklin*, 8 Wall. 329, DAVIS, J., says: "The doctrine that the obligation between the ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board or in the custody of the master, has been so often discussed and so long settled that it would be useless labor to restate it or the principles which lie at its foundation."

In *The Delaware*, *supra*, on page 602, CLIFFORD, J., says: "Bills of lading when signed by the master, duly executed in the course of business, bind the owners of the vessel if the goods were laden

on board or were delivered into the custody of the master, but it is well-settled law that the owners are not liable if the party to whom the bill of lading was given had no goods, or the goods described in the bill were never put on board or delivered into the custody of the carrier or his agent."

The result must have been the same if the goods at the depot or "elsewhere" had been brought to the attention of the clerk who signed the bill of lading, and it had been the intention that such goods should be embraced in the receipt. They were not so embraced, and no receipt was given for any goods other than the "nineteen packages more or less" then on the wharf. It is not a question of intention simply except so far as that intention is learned from the language used in the writing.

It may be true as stated in 2 Redf. on Railways, § 156, par. 6, "that an acceptance by the carrier at an unusual place will be sufficient to charge him," but by the same authority there must be an acceptance and by some one legally authorized. Here there was not only no acceptance, at any place except on the wharf, but no one authorized to make the acceptance elsewhere.

The action is against the defendants as owners of the boat. The goods were received by one employed for that purpose. So far as appears he had no authority other than that usually attached to such a position, certainly no more than the master ordinarily has; and that as already seen is sufficient only to bind the owners when exercised in the ordinary course of business and in relation to goods delivered on board, or into the actual possession of the master at the wharf. *The Delaware, supra*, on page 602.

Nor is there any evidence upon which the jury could find a constructive delivery. That can be only when by the constant practice and usage of the carrier he receives property left for transportation at a particular place. 1 Chit. on Cont. 686, note.

If therefore the instructions were correct as abstract principles of law, they were not applicable to this case for want of testimony upon which they can rest; and in this respect the case is analogous to that of the *United States v. Breitling*, 20 How. 252, and must be governed by the doctrine there laid down on page 255, as follows: "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the

facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

In this case we must infer that the jury were led into error, for while there is no evidence tending to show any liability on the part of the defendants for loss of, or damage to any goods not on the wharf at the time the bill of lading of September 9 was given, we are unable to account for the amount of the verdict except on the ground that they were held for all the goods started from New York, though for aught that appears some of them, and perhaps all that were lost, may never have been put into their custody.

3. The court in ruling upon the admissibility of testimony offered by defendants upon the condition of the goods when received, held that the bill of lading was conclusive evidence as to their apparent condition at that time.

A bill of lading is twofold in its character. It is a receipt as to the quantity and condition of the goods shipped, and a contract to transport and deliver the same upon the terms specified. That used in this case began in the usual form: "Shipped in apparently good order and well conditioned," and describing the property as "19 packages H. H. goods more or less," and contains at the close the clause: "Contents and condition unknown." The first clause if applied to the condition of the goods would be inconsistent with the last; for condition unqualified would include the apparent as well as the real; if the first is applied to the packages, then both can stand together and each have its full and proper meaning and effect. However it may be in this, in many cases this would be a matter of importance to enable the parties, if the goods were injured when delivered at the end of the route, to ascertain the more easily whether the injury happened during the carriage or was the result of a previous defect. This was the construction given to a similar bill of lading in *Clark v. Barnwell*, 12 How. 283, holding that the acknowledgment as to condition extended only to the cases, "excluding any implication as to the quantity or quality of the article, or condition of it at the time received on board, or whether properly packed or not in the boxes."

Under this construction as the testimony offered related to the

condition of the goods and not to that of the packages, it is evident that it should have been received.

But we if we discard the last clause and apply the first to the condition of the goods, the result must be the same. So far as a bill of lading is receipt, it has the same character as other receipts and is subject to the same principles of law. We are not aware of any more solemnity in its execution or any more importance to be attached to it than to other instruments of a like nature. It has often been decided that it may be modified, controlled or contradicted by parol testimony. Upon this point the authorities are numerous and uniform or nearly so. *O'Brien v. Gilchrist*, 34 Me. 554; *Turbox v. Eastern Steamboat Co.*, 50 id. 339; *Sears v. Wingate*, 3 Allen, 103; *Shepherd v. Naylor*, 5 Gray, 591; *Blanchard v. Page*, 8 id. 287; *Richards v. Doe*, 100 Mass. 524; *Hastings v. Pepper*, 11 Pick. 43; *Maryland Ins. Co. v. Rider's Admr.*, 6 Cr. 340; *Nelson v. Woodruff*, 1 Black. 156; *Ship Howard v. Wissman*, 18 How. 231; *The Delaware*, 14 Wall. 601; 2 Whart. Ev., § 1070; 1 Greenl. Ev., § 305.

Some of these cases as well as others are relied upon to sustain the ruling in question, at least by implication, but a careful examination of them we think leads to a different conclusion. Perhaps one of the strongest is that of *Hastings v. Pepper*, in which it is said the acknowledgment in the bill of lading that the goods were in "good order and well conditioned, is *prima facie* evidence that as to all circumstances which were open to inspection and visible, the goods were in good order; but it does not preclude the carrier from showing, in case of loss or damage, that the loss proceeded from some cause which existed but was not apparent, when he receives the goods." In this case there was no qualification to the acknowledgment, hence in terms it applied as well to hidden as to open defects. Still the court said it was *prima facie* as to the open, and in effect that it had no bearing upon such defects as were not visible. This is the only construction we can give the language without taking all meaning and effect from the phrase *prima facie* so unqualifiedly used. In the same opinion it is stated that this is one of the positions which "may be taken to be perfectly well established." This case is referred to and in this respect adopted in *Nelson v. Woodruff*. This will be found to be the result of most or all the cases where a construction is given to a bill of lading, with an admission thus unqualified, and it is unnecessary to refer to them more particularly.

It would be singular indeed if a qualified admission is to have a greater effect than one without qualification.

The reason given in some of the cases, as in *Barrett v. Rogers*, 7 Mass. 300, why the admission though unqualified should not apply to or be holden conclusive as to interior or invisible defects, "because such were not open to inspection" cannot avail as a reason why the admission should be held conclusive in regard to those matters which are open. The distinction between the visible and invisible defects is not to affect the construction to be put upon the language used. In either case it is but an admission and must be treated as such. It may and must affect the probative force of the acknowledgment. A receipt is open to explanation by evidence *aliunde*, not because the matters therein referred to are more or less apparent, but because it is an admission and nothing more than an admission, and its nature is the same whether written or verbal, qualified or absolute.

It is self-evident that every admission offered in evidence will depend for its force upon the circumstances under which it was made. If made without knowledge and when knowledge could not reasonably be expected, as held in some of the cases cited, it would have no effect whatever. If on the other hand it was deliberately made with knowledge or under such circumstances as to show a duty to know, the probative force would be great; and under some circumstances so great that a jury might hold a party to it, though he testified differently upon the stand; certainly unless he gave a satisfactory explanation of the change. This is undoubtedly what, and all that was meant by the remark found in a few of the cases cited, that the carrier is bound by the admission of the condition of the goods received when plainly visible. The context shows that nothing more could have been intended.

In accordance with these views the number of articles stated in the receipt, though clearly open to inspection, has always and without question been held open to explanation, and in *Ship Howard v. Wissman*, *supra*, as in other cases, testimony as to the apparent, as well as the real condition of the cargo, was admitted without objection to overcome the *prima facie* case made by the bill of lading.

An admission in writing or otherwise, is not conclusive when not true, unless by way of estoppel, which is not applicable here. It might be, had the bill of lading been assigned to a *bona fide* pur-

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chaser of the goods. But such is not the case. This action is in favor of the shipper and the plaintiff has acquired no new rights, has in no respect changed his condition in consequence of the admissions made as to the quality of the goods.

Exceptions sustained.

APPLETON, C. J., WALTON, BARROWS, LIBBEY and SYMONDS, JJ., concurred.

STATE. V. LITTLEFIELD.

(70 Me. 452.)

Criminal law — former conviction.

A former conviction of assault and battery is no bar to an indictment for manslaughter, where the injuries resulted in death after the former conviction (See note, p. 339.)

INDICTMENT for manslaughter. The opinion states the case.

W. H. White, county attorney, for State.

L. H. Hutchinson and A. R. Savage, for defendant, cited *Com. v. Bosworth*, 113 Mass. 200; s. c., 18 Am. Rep. 467.

LIBBEY, J. This is an indictment for manslaughter. The indictment alleges, in substance, that the defendant on the 3d day of March, 1879, made an assault upon one George Morton, and inflicted upon him certain mortal wounds, of which he died on the 23d of said month.

The defendant pleaded in bar a former conviction of simple assault and battery upon said Morton, on said 3d day of March, before the municipal court of Lewiston, on the 4th day of said March.

To this plea the county attorney filed a general demurrer, which was joined, and the demurrer was sustained by the court, and the defendant ordered to plead over, and thereupon pleaded guilty.

The case comes before this court on exceptions to the foregoing ruling, with the stipulation that if the plea in bar is adjudged

good by this court the defendant is to have leave to withdraw his plea of guilty.

No objection is made in argument to the sufficiency of the defendant's plea in bar, but the case is presented by both sides upon the facts, assuming that the pleadings are in proper form to raise the legal questions involved. We therefore have no occasion to consider the sufficiency of the plea either in form or substance.

The precise question presented is whether the conviction of the defendant before the municipal court of Lewiston, on the 4th day of March, of simple assault and battery, for the same battery of which Morton died on the 23d day of March, is a bar to the indictment for manslaughter.

The plea of former conviction, like that of former acquittal, is founded upon that great principle and fundamental maxim of criminal jurisprudence, that no man shall be twice put in jeopardy for the same offense. This is one of the ancient and well-established principles of the common law, sanctioned and enforced in the Constitution of this State in the following words: "No person, for the same offense, shall be twice put in jeopardy of life or limb." Const. of Maine, art. 1, § 8. This clause is in substance embraced in most, if not all, of the Constitutions of the several States, and in the Constitution of the United States, and as construed by the court is equivalent to a declaration of the common-law rule that no person shall be twice tried for the same offense.

To constitute a bar to the indictment against the defendant it is a well-established rule that the former conviction must have been for the same offense in law and in fact.

Mr. Justice BLACKSTONE states the rule thus: "It is to be observed that the pleas in *autrefois acquit* and *autrefois convict*, or a former acquittal and a former conviction, must be upon a prosecution for the same identical act and crime." 4 Black. Com. 336.

It is believed that this rule is uniformly recognized and sanctioned by courts governed by the rules of the common law. *Res v. Vandercomb*, 2 Leach C. C. 708; *Stark Cr. Pl. 355* (1 Am. ed.); *Com. v. Roby*, 12 Pick. 496; 2 Lead. Cr. Cas. 555 (note by B. & H.) and cases there cited.

Mr. Chitty states the rule as follows: "As to the identity of the offense, if the crimes charged in the former and present prosecution are so distinct that evidence of the one will not support the

other, it is inconsistent with reason, as it is repugnant to the rules of law, to say that the offenses are so far the same that an acquittal of the one will be a bar to the prosecution of the other." 1 Chit. Cr. Law, 453.

In *Com. v. Roby*, SHAW, C. J., says: "In considering the identity of the offense it must appear by the plea that the offense charged in both cases was the same in law and in fact."

The general rule by which it is to be determined whether an acquittal or conviction on one indictment is a good bar to another is stated by many authorities in substance as follows: If the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal or conviction on the first indictment will be a bar to the second. *Rex v. Vandercomb*, *supra*; 2 East's P. C. 522; *Com. v. Roby*, *supra*.

This general rule is however subject to this exception. When after the first prosecution, a new fact supervenes, for which the defendant is responsible, which changes the character of the offense, and together with the facts existing at the time constitute a new and distinct crime, an acquittal or conviction of the first offense is not a bar to an indictment for the other distinct crime. *Case of Nicholas*, Foster Cr. L. 64; *Com. v. Roby*; *Burns v. People*, 1 Park. 183; *Com. v. Evans*, 101 Mass. 25; *State v. Hattabough*, 66 Ind. 223.

Com. v. Roby was an indictment for murder. The defendant pleaded in bar a conviction of assault with intent to murder, before the death of the party assaulted. SHAW, C. J., in discussing the question of the identity of the offenses, says: "The indictment for murder necessarily charges the fact of killing as the essential and most material fact, which gives its legal character to the offense. If the party assaulted after a felonious assault dies within the year and a day, the same act, which till the death was an assault and misdemeanor only, though aggravated, is by that event shown to have been a mortal wound. The event, strictly speaking, does not change the character of the act, but it relates back to the time of the assault, and the same act, which might be a felonious assault only had the party not died, is in truth shown by that event to have been a mortal wound; and the crime, which would otherwise have been an aggravated misdemeanor, is thus shown to be a capital felony. The facts are essentially different, and the legal character of the crime essentially different." The

same principle is affirmed in *Com. v. Evans*, *Burns v. People*, and *State v. Hattabough*, *supra*, which in their facts, are like the case at bar.

At the time of the first prosecution and conviction the defendant had not committed the crime with which he is now charged. True the force had been inflicted upon the body of Morton, but his death had not ensued. The force was acting to produce its effect, and the defendant was as much responsible for its natural and necessary result as if he had all the while been pressing it upon the body of his victim. When death was caused by that force a new and distinct crime was consummated by the defendant, of which he was not before guilty, and for which he could not have been convicted at the time of the first prosecution. The offenses are not the same in fact, and therefore are not identical.

It is claimed in behalf of the defendant, that as by the statutes of this State, the crime of assault and battery is now a felony, he may, under this indictment, be again convicted of that crime and thus be twice punished for the same offense. If the homicide was caused by the injuries inflicted, which is not denied by the plea in bar, but admitted by the plea of guilty, which is a part of the case, the defendant cannot properly be convicted upon this indictment of assault and battery, because it must be either murder, manslaughter or justifiable homicide. *Burns v. People*, 1 Parker, 183. A conviction of assault and battery would be authorized only on failure of proof that death resulted from the injuries inflicted.

But it frequently happens that a man is in a certain sense, twice punished for the same acts; as when the facts constituting the first offense, taken in connection with other facts, for which he is responsible, constitute a distinct and different offense. In such case, although he has been convicted of the first offense, he may be convicted of the second, notwithstanding that to convict of the second, it is necessary to prove the facts embraced in the first. The rule upon this point is very clearly and fully stated by WALTON, J. in *State v. Inness*, 53 Me. 536.

But admitting that the defendant may be legally convicted of the crime of assault and battery, on this indictment, still we are of opinion, that under the rules of pleading, he may protect himself from being twice in jeopardy for the same offense. He may plead the former conviction in bar of the offense of assault and battery, embraced in the indictment, and not guilty of manslaughter; and

then if acquitted of manslaughter, he will have the benefit of his plea in bar. At common law the plea of former conviction in bar must set forth the record of the former conviction, and plead over as to the felony. 2 Hale, 255-392; Arch. Cr. Pr. and Pl. 352; *Com. v. Curtis*, 11 Pick. 133; Stark. Cr. Pl. 370, 375. Upon this point Starkey says, "and in general the pleading not guilty is no waiver of a special plea, and does not render it double." "But if A., having the king's pardon of manslaughter be arraigned upon an indictment for murder, he ought not to plead not guilty, for he would thereby waive his pardon. He ought to confess the indictment as to manslaughter, and plead the king's pardon; and as to killing with malice prepense he shall plead that he is not guilty. Then if he were found guilty of murder, he would have judgment; if acquitted of murder, his plea would be allowed." Stark. Cr. Pl., *supra*. The same principle applies to a plea of former conviction.

This rule is recognized in *Conn. v. Curtis*, *supra*, which was an indictment for larceny in a dwelling-house, and a plea of former conviction of larceny. WILDE, J., in the opinion of the court, says: "The defendant should have pleaded *autrefois convict* as to the larceny, and not guilty as to the residue of the charge."

The result is, that, both on principle and authority, the defendant's plea is not a bar to the indictment.

Exceptions overruled. Judgment for the State.

APPLETON, C. J., WALTON, PETERS and SYMONDS, JJ., concurred.

NOTE BY THE REPORTER.—The following are the material parts of the opinions in *State v. Hattabough*, 68 Ind. 223, where the indictment was for assault and battery with intent to kill, and the prisoner pleaded a former conviction of assault and battery:

WORDEN, J. "With this general statement of the law, we come more directly to the question involved: Is a conviction or an acquittal before a justice of the peace, of an assault and battery, a bar to a prosecution for the same assault and battery with intent to commit a felony?"

"To free the question from any confusion of ideas in respect to the jurisdiction of justices, we think it may be stated, as follows: Does a conviction or an acquittal of a simple assault and battery, before a court of competent jurisdiction to try the same, bar a subsequent prosecution for the same assault and battery with intent to commit a felony?"

"This question must, in our opinion, be answered in the negative, on principles which we regard as well established, though there are some authorities that seem to support a contrary doctrine.

"The Constitution provides, that 'No person shall be put in jeopardy twice for the same offense.'

"By the prosecution for the assault and battery, the appellee was not put in jeopardy at all for the offense of assault and battery with intent to commit the murder; while if upon the trial of the indictment, the State should fail to make out the felonious intent, the appellee could avail himself of the former conviction, so that he could not be punished twice for the same simple assault and battery." *State v. George*, 68 Ind. 434.

The usual test by which to determine whether the former conviction or acquittal was for the same offense as that charged in the second prosecution, and therefore, whether the former is a bar to the latter, is to inquire whether the evidence necessary to sustain the latter would have justified a conviction in the former case. *Burns v. People*, 1 Parker, 188; *People v. Saunders*, 4 id. 196; 1 Whart. Cr. Law, § 506; *State v. Elder*, 65 Ind. 282; s. c., 28 Am. Rep. 69.

"The question arises then, whether, if upon the trial of the cause before the justice it had appeared that the assault and battery had been perpetrated with the intent to commit the murder (a fact necessary to be established in order to support the present indictment), the appellee could have been legally convicted of the simple assault and battery. It is quite clear, under the authorities, that he could not. Neither, on general principles of law, ought he to have been; for if rightfully convicted, the conviction would bar a subsequent prosecution for the felony, and the supposed felon would escape the punishment due to his crime, suffering only the trivial punishment prescribed for the misdemeanor.

"And the reason why a conviction could not have been had upon the former trial is, that the misdemeanor involved in the assault and battery was merged in the felony.

"There was no crime of assault and battery as an independent offense. The felony was the crime and the only crime of which the appellee was guilty. Therefore the evidence necessary to sustain the indictment could not have justified a conviction of the simple assault and battery. Hence the appellee was not, by the former prosecution, put in jeopardy for the crime charged in the indictment.

"The doctrine of merger in such case, though it has been in some instances called in question, is too thoroughly established in our system of criminal jurisprudence to be abrogated without legislative sanction. Nor is it perhaps desirable that it should be; for if one guilty of a felony may be convicted of the misdemeanor involved in the felony, and thereby escape the punishment due to the felony, by setting up the former conviction, the purpose of the law in prescribing a greater punishment for felonies than misdemeanors will be thwarted. The good of society requires, rather, that if charged with the misdemeanor, he should be acquitted thereof, and put upon his trial for the felony.

"In reference to the merger we quote the following passage from the opinion of this court, delivered by STUART, J., in the case of *Wright v. State*, 5 Ind. 537: 'Assault and battery, which is simply a misdemeanor, is not included in any of the degrees of homicide. The misdemeanor is merged in the felony. The assault and battery which results in death must belong either to felonious homicide embraced in murder or manslaughter; or to justifiable or excusable homicide, as the execution of a felon by due course of law, or in a proper measure of self-defense. In either event, the simple assault and battery no longer remains as such to be punished. It is either merged, justified or excused.'

"The merger of the misdemeanor in the felony is as complete in the case of an assault and battery with intent to commit murder, as where the murder is committed.

"We quote the following paragraph from 2 Russell on Crimes, p. 1086, 9th ed., as illustrative of the foregoing views:

"Thus where the defendant was indicted for a misdemeanor, in burning a house in his own occupation, such house being alleged to be contiguous and adjoining to certain dwelling-houses of divers liege subjects, etc.; and the facts of the case, as opened by the counsel for the prosecution, appeared to be that the defendant set fire to his own house, in order to defraud an insurance office, and that in consequence several houses of other persons, adjoining to his own, were burnt down, BULLER, J., said that if other persons' houses were in fact burnt, although the defendant might only have set fire to his own, yet under these circumstances the prisoner was guilty, if at all, of felony (the misdemeanor being merged) and could not be convicted in this indictment; and therefore he directed an acquittal.'

"The case before us cannot be distinguished in principle from that of *People v. Saunders*, 4 Parker, 196, above cited. There the defendant was indicted for a rape, and he pleaded that he had been convicted before a justice of the peace of an assault and battery upon the prosecutrix, and fined twenty dollars, and sentenced to imprisonment for thirty days in the county jail, in case the fine was not paid, and that he had paid the fine; that the assault and battery of which he had been so convicted was the same assaulting, beating and carnally knowing the prosecutrix charged in the indictment, and was one and the

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same assault and battery, etc. This plea was held bad. The court said, among other things, as follows: 'There is another reason why the plea must be held void. The plea of *autrefois convict* admits the offense charged in the indictment, and as these pleas admit the crime of rape against the defendant, he could not be convicted of assault and battery, for the misdemeanor was merged in the felony.' A number of authorities are cited upon the point.

"In 1 Whart. Crim. Law, at section 586 above cited, the author says: 'Even where the first trial is for a misdemeanor, and the second for a felony, the test holds good that the plea is sufficient if the evidence requisite to support the second indictment must necessarily have supported a conviction on the first. Where the doctrine of merger obtains, the evidence of the consummated felony would have secured an acquittal on the first indictment, and such acquittal would have been no bar. Thus, it has been said, that where on an indictment for an assault to rob, murder, or ravish, the felony turned out to have been completed, the defendant's acquittal, which the court would have been bound to direct, would have been no bar to an indictment for the felony.'

"In *Seurin v. People*, 37 Ill. 414, the court, without entering upon any lengthy discussion of the question, said: 'If an indictable offense has really been committed, we apprehend this conviction for a simple assault and battery cannot be pleaded in bar of a prosecution for such offense.'

"Assuming, as we must, for the purposes of the question involved, that the appellee was guilty of assault and battery with the intent charged in the indictment, he was not guilty of the simple assault and battery to which he pleaded guilty, as that offense was merged in the felony; and it was his own fault that he was convicted thereon. By a proper defense he could have successfully resisted that prosecution; and as by that prosecution he was not put in jeopardy regarding the felony, that conviction is no bar to the prosecution for the felony. And as we have already seen, upon the trial of the cause upon the indictment, the appellee can give in evidence the former conviction; and in case the court or jury trying the cause should find him not guilty of the intent charged, thus leaving the assault and battery a simple one, uncoupled with the felonious intent, the former conviction will be a bar to the prosecution for the simple assault and battery."

BROOK, J., dissenting. "Upon a careful consideration of the question, I find it impossible to concur in the opinion of the majority of the court in this case, without sacrificing what seems to me to be a judicial duty. The unqualified doctrine, that a conviction or an acquittal of a simple assault and battery before a court of competent jurisdiction to try the same is not a bar to a subsequent prosecution for the same assault and battery with intent to commit a felony, which I understand to be the basis of the majority opinion, is so repugnant to my judgment that I am constrained to enter my dissenting opinion.

"The answer pleaded in this case shows a conviction of the assault and battery in a court of competent jurisdiction to try the same; and the answer avers that it is the same assault and battery now charged against the appellee in the pending indictment, with intent to commit the murder charged. The conviction before the justice of the peace, being before a court of competent jurisdiction to try the case, is as effective as if it had been tried in the Circuit Court upon indictment, and a conviction had thereon. According to the opinion of a majority of the court, as I understand it, it would necessarily follow, then, that if the appellee had been indicted and convicted in the Circuit Court for the simple assault and battery, as stated in the answer he has filed, and afterward was indicted as he now stands charged, the former conviction could not be pleaded to the present indictment. While it is very clear from our own decisions, that if the appellee had been indicted in the Circuit Court for the assault and battery in one count, and for assault and battery with intent to commit the murder in another count of the same indictment, or if he had been indicted for the assault and battery with intent to commit the murder in one count, a conviction in either case of the simple assault and battery would be a bar to the higher degree of the crime. *Weinsorpfis v. State*, 7 Blackf. 186; *Clem v. State*, 43 Ind. 430; a. c. 13 Am. Rep. 399; *Fritz v. State*, 40 Ind. 18; *State v. George*, 53 Ind. 434.

"But the opinion is based upon the doctrine of merger; that the assault and battery is merged in the assault and battery with the intent to commit the murder. If this doctrine be true, that the lower crime is merged in the higher crime, which includes it, then every assault and battery is merged in the assault and battery with intent to commit a felony,

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and every assault and battery with intent to commit a felony is merged in the felony when the felony is committed.

"According to this rule it would be impossible to convict of any of the lower degrees of the offense unless they stood alone, uncoupled with the higher degree of the offense.

"According to the doctrine of merger, but for these sections, no conviction could be had in such cases except for the highest degree of crime charged in the indictment, and according to our decisions a conviction or acquittal of the lower degree of the crime in such cases is a bar to subsequent indictment for the higher degree.

"It cannot be said that because the justice of the peace before whom the conviction of assault and battery was had, as set forth in the answer we are considering, had no jurisdiction of an assault and battery with intent to murder, therefore the answer is insufficient. The charge before the justice was simply for an assault and battery, over which he had jurisdiction, and which he was competent to try, and whose judgment is as effective as if it had been had in the Circuit Court upon indictment, and I think just as effective as if in the Circuit Court it had been coupled in the same indictment with the intent to commit the murder, and a conviction had. I agree that if before the justice the charge had been for an assault and battery with the intent to commit the murder, and he had convicted him of the assault and battery merely, the conviction would have been a nullity.

"We have seen by the authorities that if the conviction of the assault and battery had been adjudged in the Circuit Court, upon an indictment charging the assault and battery with intent to murder, it would have been a bar to a subsequent indictment for the assault and battery with the intent to murder; and I cannot understand why a conviction for an assault and battery, founded upon a charge of assault and battery with intent to commit murder, can be made any more effective than a conviction for the same assault and battery founded upon a charge of assault and battery alone; and when it must be held that the conviction before a justice has the same effect as a conviction in the Circuit Court, the conclusion seems to me irresistible that the answer under consideration is sufficient. And to my understanding the opinion of a majority of the court is inconsistent with itself, for it lays down the rule that 'The usual test by which to determine whether the former conviction or acquittal was for the same offense as that charged in the second prosecution, and therefore whether the former is a bar to the latter, is to inquire whether the evidence necessary to sustain the latter would have justified a conviction in the former case;' and authorities are cited in support of the rule. With this rule I concur; I believe it to be the law; but how it can be said that the evidence necessary to convict upon the charge in the indictment before us, which is for an assault and battery with intent to commit murder, would not 'justify a conviction in the former case' set up in the answer, which is simply for the same assault and battery, is what I cannot perceive. Surely, evidence which proves an assault and battery with intent to commit murder proves the assault and battery. The intent which makes the crime a felony, whatever may be its moral turpitude, is legally harmless when uncoupled with the assault and battery. Alone, the intent is impalpable and unpunishable. And how the appellee could be tried on the present indictment without putting him in jeopardy twice for the assault and battery set up in the answer, is also what I cannot understand. My learned brother who delivered the opinion of a majority of the court, after laying down the well-settled rule as above, reasoned, as it seems to me, directly against it, as if it were necessary that the evidence which would convict in the former case, should necessarily convict in the latter case. This is reversing the rule. He says: 'The question arises, then, whether if upon the trial of the cause before the justice it had appeared that the assault and battery had been perpetrated with the intent to commit the murder' (a fact necessary to be established in order to support the present indictment), 'the appellee could have been legally convicted of the assault and battery, it is quite clear, under the authorities, that he could not; neither, on general principles of law, ought he to have been; for if rightfully convicted, the conviction would bar a subsequent prosecution for the felony.' Here the learned judge says, that if the appellee was rightfully convicted before the justice of the peace, 'the conviction would bar a subsequent prosecution for the felony.' How can this court say, when the question comes up collaterally, that the conviction before the justice was not rightfully had?

"The same judge, in the case of *State v. George*, 53 Ind. 494, held that a conviction of an assault and battery before a justice of the peace, though upon a bad affidavit, is a good

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bar to a subsequent prosecution for the same offense. Every presumption is in favor of the record. We cannot presume that there was any evidence before the justice showing that the assault and battery was committed with the intent to commit the murder as charged in the indictment. Indeed, in the present case, such a presumption is forbidden by the face of the record, for it shows that the prosecution was simply for an assault and battery, and that the plea to it was 'guilty.' Upon this plea no evidence was necessary to support the conviction, and we cannot presume that any was given, thus showing that the State elected to prosecute the appellee for the assault and battery merely, and to accept his plea of 'guilty.' The State is therefore bound by the record. She cannot prosecute the appellee again for an offense which puts him in jeopardy again for the same offense upon which he has been convicted. The justice had jurisdiction over the subject-matter, and over the person of the defendant, and we cannot say that the conviction was not rightfully adjudged; and, being rightful, it is a bar to the indictment for the same offense. There is nothing in the record showing that the conviction had any thing to do with an assault and battery with the intent to murder, and a subsequent indictment cannot change the effect of the record. The former conviction cannot be affected by the subsequent indictment, but the subsequent indictment can be answered by the former conviction. It is impossible to convict upon the indictment without convicting twice for the assault and battery.

"It was a maxim in the common law of England, that no man was to be put in jeopardy more than once for the same offense, under which it was held that a conviction of manslaughter was a bar to an indictment for murder. 4 Bl. Com. 396.

"Wharton, in his treatise on criminal law, in section 505, in discussing this principle, states, 'that in cases of felony, where one of the offenses is a necessary ingredient or accompaniment of the other, and where the State has selected and prosecuted the former to conviction, there can be no further prosecution on the other,' and after citing authorities in its support, lays down the rule, that 'Where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea is generally good, but not otherwise;' and in section 566 he states the rule to be the same when the offenses are of different grades,—that 'Even where the first trial is for a misdemeanor, and the second for a felony, the test holds good that the plea is sufficient if the evidence requisite to support the second indictment must necessarily have supported a conviction on the first.' The question before us now is not whether several offenses may not arise out of the same state of facts, and each be punished, but the question is whether the subsequent prosecution necessarily includes the former; if it does, then a conviction on the former is a good bar to the latter.

"Upon the question whether the conviction of a lesser offense will bar the greater offense, in which the lesser is included, we find the following rule stated in 1 Bishop Crim. Law, § 1,057: 'But where the conviction or acquittal is upon an indictment covering no more than one of the smaller crimes, included, as before mentioned, within a larger, the question arises, whether this will bar an indictment embracing one of the larger. If it will not bar, then the prosecutor may begin with the smallest, where there are several crimes included within one another, and obtain successive convictions, ending with the largest; while if he had begun with the largest, he must there stop,—a conclusion repugnant to good sense. Besides, as the larger includes the smaller, it is impossible a defendant should be convicted of the larger without being convicted also of the smaller; and thus, if he has been already found guilty of the smaller, he is, when on trial for the larger, in jeopardy a second time for the same, namely, the smaller, offense. Some apparent authority, therefore, English and American, that a jeopardy for the less is no bar to an indictment for the greater, must be regarded as unsound in principle; while the doctrine which holds it to be a bar rests firmly on adjudication also.'

"In the case of *King v. Vandercornb*, 3 Leach C. C. 706, cited in 1 Leading Criminal Cases, 534, the court lays down the true principle, and its application, as follows: 'These cases establish the principle, that unless the first indictment were such as the prisoners might have been convicted upon it, by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. A former acquittal is no bar to a subsequent prosecution, unless the accused could have been convicted upon the first indictment, upon proof of the facts averred in the second. Now to apply the principle of

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these cases to the present case: The first indictment was for burglariously breaking and entering the house of the Misses Nevilles, and stealing the goods mentioned; but it appeared that the prisoners broke and entered the house with intent to steal, for in fact no larceny was committed, and therefore they could not be convicted on that indictment; but they have not been tried for burglariously breaking and entering the Misses Neville's house with intent to steal, which is the charge in the present indictment, and therefore their lives have never been in jeopardy for this offense. For this reason the judges are all of opinion that the plea is bad.'

"It is plain in this case that the facts charged in the second indictment could not have convicted the accused on the first indictment, because proof of the intent to commit the larceny was not proof of the larceny itself; and it is also plain that if the accused had been first convicted on the indictment for burglary with the intent to commit the larceny, and afterward had been indicted for the burglary with the commission of the larceny, the conviction on the first indictment would have been a bar to the second, because larceny cannot be committed without the intent to commit it; the proof, therefore, which would have convicted under the second indictment would necessarily have convicted under the first. So, in the case before us, the proof which would convict under the indictment for an assault and battery with intent to murder would necessarily convict of the assault and battery set up in the answer; the answer is therefore under the principle well settled, sufficient to bar the indictment. In the case of *State v. Shepard*, 7 Conn. 54, it was directly held that a conviction on an indictment for an assault with intent to commit a rape was a bar to an indictment for committing the rape, the court saying that: 'If the conviction there cannot be pleaded in bar of an indictment for a rape, then he may be tried again; and as he has already suffered, and is still enduring a punishment for the less crime, and may be condemned and suffer for the greater, he may be twice punished for the same fact — a doctrine repugnant to well-established principles of law.'

"In the case of *State v. Chaffin*, 2 Swan, 493, it was held that a party having been convicted of an assault cannot afterward be punished for a battery committed at the same time. The opinion of the court is brief and in these words: 'The battery includes the assault, and for the assault the defendant has received the legal punishment. He cannot now be punished for the battery, because it cannot be separated from the assault. The one is a necessary part of the other, and if he be now punished for the battery he will thereby be twice punished for the assault, that is, be twice punished for the same offense, which of course cannot be done.'

"In the case of *Hickey v. State*, 23 Ind. 21, it was held by this court that a prosecution for larceny would bar a prosecution for robbery in taking the same goods, because the robbery included the larceny. In the case of *Hamilton v. State*, 36 Ind. 290; a. c., 10 Am. Rep. 22, it was held that a prosecution for an assault and battery with the intent to commit a robbery would bar a prosecution for the robbery itself. The case of *Jackson v. State*, 14 Ind. 327, was as follows: 'The indictment charged the defendant with stealing two horses. It appears in evidence that he stole with the horses saddles and bridles. It was claimed that there was a fatal variance. This was a mistake. The proof established the stealing of the articles charged in the indictment. This sustained the prosecution. The omission to include in the indictment other articles stolen at the same time and forming a part of a single offense, was for the defendant's benefit, if it had any bearing upon the case. It made the offense charged appear much less aggravated than it really was, while the conviction or acquittal on the indictment as drawn, would bar another prosecution for the same larceny. The State cannot split up one crime and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime.'

"We think it is impossible to distinguish these cases, in principle, from the case we are now considering; and the following authorities, as it seems to me, fully support the whole scope of this dissenting opinion: *Bruce v. State*, 9 Ind. 206; *Trittip v. State*, 13 Id. 300; *Winsinger v. State*, Id. 540; *Clem v. State*, 42 Id. 420; s. c., 13 Am. Rep. 300; *Brinkman v. State*, 53 Ind. 71; *Wilkinson v. State*, 59 Id. 418; *King v. Emden*, 9 East, 457; *Commonwealth v. Squire*, 1 Met. 258; *Commonwealth v. Kinney*, 2 Va. Cas. 130; *State v. Lewis*, 2 Hawks, 98; 11 Am. Dec. 741; *Price v. State*, 19 Ohio, 423; *State v. Birmingham*, Busbee, 130; *State v. Keogh*, 13 La. Ann. 243; *State v. Cooper*, 1 Green (N. J.) 361; *Roberts v. State*, 14 Ga. 8; *People v. Van Kester*,

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1 Parker, 66; *State v. Townsend*, 2 Harring. 543; *State v. Benham*, 7 Conn. 414; *Commonwealth v. Cunningham*, 13 Mass. 245; *Commonwealth v. Tenney*, 91 id. 50; *Holt v. State*, 38 Ga. 187; *State v. Reel*, 12 Md. 283; *Wilson v. State*, 24 Conn. 57; *Hite v. State*, 9 Yerg. 357; *Durham v. People*, 4 Cam. 173; *State v. Elder*, 65 Ind. 232; s. c., 32 Am. Rep. 69.

"If the rule laid down by the majority of the court in this case, as the law of the land, must prevail, I do not see why any person charged may not be convicted, upon separate indictments, if the evidence warrants it, first for an assault and battery, second, for an assault and battery with intent to commit a felony, and third, for the felony, when, in fact, the offenses are but the component parts of one offense, namely, the felony, and thus be punished three times for the same offense. I do not think the State can apportion one crime into several offenses of different grades, and punish the offender for each portion by piecemeal. The State must choose her ground, and when once chosen, and the offense prosecuted to final judgment, she cannot be allowed to change her ground, and turn the same state of facts into another grade of the same offense, the proof of which would sustain the former charge also. Such a doctrine would tend to a Draconian severity, unwarranted by the spirit of American institutions, and as I think, in violation of the Constitution of the State of Indiana."

In *Simco v. State*, 9 Tex. Ct. App. 338, the court said: "But it is said that the verdict of guilty of embezzlement on the first trial was an acquittal of the charge of theft, and that the indictment being for theft, and being good, and the transaction upon which the two indictments are based being identically the same, the plea of former acquittal is a good plea in bar of the prosecution for embezzlement, and should have prevailed and defendant been discharged. Our statute in prescribing the only special pleas which can be heard for the defendant, names former conviction and former acquittal, and provides that the character of the latter plea shall be, 'that he has been before acquitted by a jury of the accusation against him, in a court of competent jurisdiction, whether the acquittal was regular or irregular.' Code Cr. Proc., art. 525. But it must be 'for the same offense.' Id. art. 21. He must have been acquitted of the accusation against him, not of another or entirely different accusation growing out of the same transaction. 'In *autrefois acquit* it is necessary that the prisoner could have been convicted in the first indictment of the offense charged in the second. * * * The rule seems to be well settled that a former trial (on a plea of former acquittal) is not a bar unless the first indictment was such that the prisoner might have been convicted upon proof of the facts set forth in the second indictment.' *Irrin v. State*, 7 Tex. Ct. App. 78; *Hozier v. State*, 6 id. 542; *Swancoat v. State* 4 id. 108; *Domtich's case*, 40 Ala. 680; *Foster's case*, 39 id. 239; *Harrison's case*, 36 id. 248.

"Now let us apply the rule. As we have seen, in the former case the indictment was for theft; the conviction, for embezzlement. The case was reversed. Why? Solely because at the time the offense was committed — i. e., before the Revised Statutes went into effect — a conviction for embezzlement could not be had on an indictment for theft. *Simco v. State*, 8 Tex. Ct. App. 406. Does the fact that the party is now charged with embezzlement, and not theft, alter the rule? We cannot imagine how it can be so. It applies with as much force one way as the other, and vice versa. The decision in the former appeal settles the plea of former acquittal in this case.

"There is a marked difference in modern practice between the rules which govern the two pleas of *autrefois acquit* and *autrefois convict*, notwithstanding the immense amount of dictum and loose expressions to the contrary found in the books. *Autrefois acquit* is only available in cases where the transaction is the same and the two indictments are susceptible of, and must be sustained by, the same proof. These two elements must combine, and are both *sine qua non* to the sufficiency of the plea. *Autrefois convict* only requires that the transaction, or the facts constituting it, be the same. To illustrate: If a party be indicted separately for the theft of three horses, the property of A., B., and C. taken at the same time or in one transaction, and he be tried on the first for the theft of A.'s horse, and the State fails from misnomer, or the defendant by proving A.'s consent should be acquitted, would the plea of that acquittal operate a bar to the conviction on the other trials because the transaction was one and the same? By no means. Why? Simply because the proof necessary to a conviction in the latter cases would not convict in the former. *Pickens v. State*, 9 Tex. Ct. App. 270; 1 Whart. Cr. Law (6th ed.), § 537, and authorities cited."

HINKLEY AND EGERY IRON COMPANY V. BLACK.

(70 Me. 472.)

Features—vendor and purchaser—chattel mortgage.

Where one enters into possession of land, under a contract for future purchase, paying no rent, and erects substantial buildings and machinery for the prosecution of his business, and fails to fulfill the contract and acquire the title, the erections are realty, and cannot be brought within a chattel mortgage of them by the vendee.*

TROVER to recover the value of buildings, engines, machinery, etc., as personal property. The opinion states the case.

Wilson & Woodward, for plaintiffs.

C. P. Stetson and *L. A. Emery*, for defendant.

SYMONDS, J. On the 17th day of November, 1866, the defendant gave to John D. Hopkins and James H. Hopkins an agreement to convey to them a large tract of land in Hancock county upon certain specified terms and upon the express condition that the said Hopkins should pay him on or before maturity four notes for \$19,260 each, payable with interest annually in one, two, three and four years from that date. If the notes and interest, or any one of the same, were not paid when due, then the obligation was to be void, time being expressly regarded as of the essence of the agreement. The said Hopkins were to go into immediate possession of the land, to use and occupy it as their own, the defendant reserving the right to take possession of the property, and of whatever might be taken from the same, whenever he deemed it expedient for his own security.

The said Hopkins, with Edward K. Hopkins and Charles D. McDonald, forming the firm of J. D. Hopkins & Co., went into possession under the contract, erected large and substantial buildings, with engines and machinery, for the purpose of manufacturing an extract from bark, to be used in tanning. These are referred

* Compare *Globe Marble Mills Co. v. Quinn* (76 N. Y. 23), 32 Am. Rep. 229; *Cent. Branch R. Co. v. Fritz* (30 Kans. 430), 27 Am. Rep. 175; *Hutchins v. Masterson* (46 Tex. 551), 28 Am. Rep. 236.

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to in the writ as the Extract Works. There were also mills, dwelling-house, stable and appurtenances.

On the 14th day of October, 1876, the said firm of J. D. Hopkins & Co. gave to the plaintiffs a personal mortgage of the buildings so erected, and of the machinery and other property, for an alleged conversion of which by the defendant the plaintiffs in this case claim to recover.

The payments were not all made as required by the contract, and for a certain period there seems to have been a waiver by the defendant of the requirements in regard to time by accepting partial payments at later dates. The last payment upon the notes was made in June or July, 1877 in the sum of \$2,700.

In December, 1877, the firm of J. D. Hopkins & Co. failed, and went into bankruptcy, leaving about \$30,000 of the amount required to entitle the obligees (for it is convenient to speak of this paper as a bond for a deed, though it was in form merely a contract to convey) to a conveyance still unpaid. The contract for conveyance was thereupon given up by J. D. Hopkins & Co. to the defendant, who claimed title and possession of the land and buildings.

The title of the defendant to the land is not disputed. Neither the obligees in the bond, nor the firm of J. D. Hopkins & Co., had any claim to the township except what this paper conferred. There is some discrepancy in the testimony upon the question whether the plaintiffs were expressly notified at the date of their mortgage, that the defendant then claimed to hold the buildings as a part of the realty, but there is nothing in the evidence to prove that the plaintiffs had any reason to suppose, or did suppose, that the mortgagors had any other rights than those which grew out of the contract for conveyance and possession and improvement thereunder; unless an inference to the contrary is to be drawn from the terms of the mortgage itself, which contained the usual warranty of title, and from the statement of the president of the plaintiff company, contradicting John D. Hopkins on this point, that there was nothing said about any defect of title at the time the mortgage was given.

The plaintiffs claim the buildings, with their contents of engines, machinery and other fixtures, under their mortgage, as personal property.

The defendant claims, that upon failure of the Hopkins to perform the express condition of the bond, the buildings being substantially and to all appearances permanently built, together with

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whatever appertained to them, were a part of the realty and the property of the owner of the land. By agreement of counsel the court is to pass only on the question of title.

An examination of the evidence, and of the description of the property, satisfies us that upon this issue in regard to the title the property mentioned in the mortgage and claimed in the writ may properly be regarded as an entirety; because upon the proof we find no conversion by the defendant of any property which would not upon familiar principles be part of the realty, if the buildings themselves were real estate. The engines, pumps, elevator, furnaces, condensers, coolers, machines for cutting the limbs and grinding the bark, saws and other apparatus, were all parts of the machinery for the extract works and for the mills, connected by shafting and belts, or by pipes, suited and intended for the process of obtaining the extract from the bark, and for other purposes connected with the mills as such, and in the main bolted or secured in a permanent way to the buildings themselves. Such machinery was a part of the mill or factory and real or personal estate according to the character in this respect of the building itself. *Symonds v. Harris*, 51 Me. 20. Our attention in the argument is not called to any thing, nor do we perceive any thing in the description given by the witnesses, of which on this evidence a conversion by the defendant can be predicated, which would not under our decisions follow the fortunes of the buildings themselves, in respect of being real or personal property.

The dwelling-house stood on cedar posts, but in regard to most of the other buildings, the evidence shows that excavations were made and foundations secured on which the buildings were supported by stone piers and other masonry.

Was this property, on failure of the Hopkins to make the payments in the bond, the real estate of the defendant, or the personal property of the plaintiffs under their mortgage?

In *McRea v. Bank*, 66 N. Y. 490, the court, following and approving an earlier decision, states the criterion of an irremovable fixture to be, "the union of three requisites, first, actual annexation to the realty, or something appurtenant thereto; second, application to the use or purpose to which the part of the realty with which it is connected is appropriated; third, the intention of the party making the annexation to make a permanent accession to the freehold."

By the words "actual annexation," in the first of the requisites mentioned we do not imagine that the court intended physical annexation; and we should prefer in its place the phrase annexation, real or constructive. For, the sufficiency of constructive annexation in the case of heavy bodies, or of articles, like keys or parts of machinery, specially fitted and designed for particular places, is, we think, universally conceded. It has been very clearly held by this court: "It is the permanent and habitual annexation, and not the manner of fastening, that determines when personal property becomes a part of the realty. * * * A thing may be as permanently affixed to the land by gravitation as by clamps or cement." *Strickland v. Parker*, 54 Me. 266.

Nor do we perceive that the words "or something appurtenant thereto," in this first requisite, extend the meaning of the words, "the realty," previously used.

Of these three tests by which to determine what constitutes an irremovable fixture, "the clear tendency of modern authority seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and others seem to derive their chief value as evidence of such intention." *Ewell on Fixtures*, 22.

And another authority, after stating the intent, actual or presumed, to be usually the most important circumstance in determining the fact, adds: "But there are some cases in which, though the erection is made by one not the owner of the freehold, an intent to retain the property in the fixtures as chattels could not be presumed, and others in which the policy of the law could not suffer effect to be given to it, if it actually existed. Thus, if one, though not the owner, is in possession under an executory contract of purchase, it is a reasonable presumption that he expects to complete the purchase, and that whatever he attaches to the realty in such a manner that if it were so attached by the owner of the freehold it would become a part of it, he intends shall be a part of it." *Cocley on Torts*, 429.

"Fixtures attached to premises by one in possession under a contract of purchase, where he fails to perform on his part and thereby to acquire a title, become a part of the realty, like fixtures annexed by a vendor or mortgagor, and may not be removed by him." 1 *Wash. Real Prop.* 6.

"It is also well settled that the right to remove fixtures annexed

to real estate by one in possession thereof under a contract for its purchase without paying rent therefor, is to be determined by the rule prevailing between grantor and grantee, mortgagor and mortgagee, and not that between landlord and tenant. Fixtures erected under such circumstances may, as against the vendor of the land, neither be removed by the vendee, mortgaged nor sold by him, nor seized and sold on fl. fa. against him as his personal property. * * * *

"According to the better opinion, also, it seems that the rule is the same where possession is taken, and the annexations made under a parol agreement for the purchase of the land, though there is some conflict of authority on the question." *Ewell* on *Fix.* 273.

In one of the later notes in *Kent* (*343) precisely the same rule is given.

These citations undoubtedly state the result of the authorities on this point. The clear weight of authority is in their support. That this rule holds in Massachusetts is conceded in argument. *Eastman v. Foster*, 8 Metc. 19, 26; *McLaughlin v. Nash*, 14 Allen, 138; *Oakman v. Ins. Co.*, 98 Mass. 57, and cases cited; *Poor v. Oakman*, 104 Mass. 309, 318; *Madigan v. McCarthy*, 108 Mass. 376; s. c., 11 Am. Rep. 371.

The rule declared in these cases is that if one erects a permanent building, like a dwelling-house, on the land of another, voluntarily and without any contract, express or implied, with the land-owner, that the building shall not become part of the realty but shall remain personal property, it becomes a part of the realty and belongs to the owner of the soil.

In *Ritchner v. Morss*, 3 Keyes, 350, it was held that, except in cases where the relation of landlord and tenant exists, one claiming the building as personal property must prove that it was erected upon an agreement between the builder and the owner of the fee of the land that it was to be considered strictly a personal chattel; which is in effect the Massachusetts rule. See, also, *Smith v. Benson*, 1 Hill, 176. The same point was expressly decided in *Ogden v. Stock*, 34 Ill. 526, and the court says, "if the party making the improvement, as between himself and the owner of the soil, has no right to erect the same as property separate and distinct from the freehold, an intention so to do, no matter how clearly manifested, is of no avail."

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The cases of *Perkins v. Swank*, 43 Miss. 349, and *Leland v. Gasset*, 17 Vt. 403, are to the same effect, and *Christian v. Dripps*, 28 Penn. St. 271, indicates that the same would be held in that State.

It is to be observed that the rule laid down, so far as applicable to this case, is in terms extended only to cases in which the conveyance fails because the obligee does not meet the conditions which were to entitle him to the deed; not to a case in which the obligor on his part refuses to perform the contract. And it was held in *Yates v. Mullen*, 24 Ind. 278, that "where A. by permission of B. built a mill on B.'s land under an agreement to purchase the land as soon as B. should have paid an outstanding judgment which formed a lien upon it and in the meantime to own the mill, and B. having failed to satisfy the judgment the land was sold

* * * * * the mill remained A.'s personal property and did not pass with the estate."

If the rule is limited to the case of contracts for the conveyance of land, where the failure to perform is on the part of the proposed purchaser, we think it is not in conflict with any decision in this State.

Thus in the case of *Rines v. Bachelder*, 62 Me. 95, cited by the plaintiffs, it appears that the fault was not on the part of the purchaser, but on the part of the vendors, who were unable to give a valid conveyance of the lands; whereupon the purchaser was allowed a reasonable time to remove the buildings as his own personal property.

The cases of *Osgood v. Howard*, 6 Me. 452, and *Fuller v. Taber*, 39 id. 519, fall substantially within the rule. We think the consent of the land-owner, as intended in these cases, includes not only his consent that the building should be erected on his land, but also that it should remain the personal property of the builder.

Nor can the cases of *Russell v. Richards*, 10 Me. 429, and 11 id. 371, and *Pullen v. Bell*, 40 id. 314, be accepted as settling the law in this State that erections, made under a parol contract for the purchase of lands under such circumstances remain the personal estate of the builder. In the former case it was on the ground, first, that the mill was built on the land of the father with his permission, at the expense and as the property of the son, with an open and express disavowal by the father of any interest

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in or claim upon it, and secondly; that it was a building erected for purposes of trade and manufacture, that the court held the mill to be the personal property of the son and those claiming under him. The decision of *Pullen v. Bell* simply follows that of *Russell v. Richards*, and would seem to be justified on the ground that the dwelling-house was not so attached to the realty as to become a part of it.

We think the opinions of the court in these two cases, properly considered, do not conflict with the rule we have drawn from the authorities. The essential distinction in this respect is not between a written and a verbal contract, but between the class of cases in which the failure to convey results from the fault of the vendor and those in which the purchaser fails to meet the conditions which entitle him to the deed. The right of the latter is merely to perfect his title by performing his contract.

In a later case than those to which we have last alluded the learned chief justice delivering the opinion of the court treats it as well-settled law that such erections made by one occupying land under a bond for a deed are to be regarded as real estate, and are not removable by the occupant as personal property. *Hemenway v. Cutler*, 51 Me. 408. And in regard to verbal contracts for the sale of lands the same result has been distinctly reached in the recent case of *Lapham v. Norton*.

Nor do we perceive that it can make any difference that the erections were by the firm, while the contract was only with two of the members who constituted the firm. The contract was made, or at least held, in the interest and for the benefit of the firm. They made the payments upon it. When title was obtained it was to be for the benefit of the firm. If a conveyance had been made to the two it would have been in trust for the partnership, and would have inured to their advantage. The firm, by arrangement with the obligees, undertook the performance of their contract, expecting to have their rights. We do not see that they could have expected or are entitled to more.

Judgment for defendant.

BARROWS, DANFORTH, VIRGIN and LIBBY, JJ., concurred.
APPLETON, C. J., and PETERS, J., did not sit.

Smalley v. Smalley.

SMALLEY V. SMALLEY.

(70 Me. 545.)

Will — subscribing witness — interest.

A subscribing witness to a will, being the son of the testator and receiving but one dollar under the provisions of the will, that being much less than his interest as heir-at-law, is a competent witness to prove the will.

A PPEAL from probate of a will. The opinion states the facts.

A. P. Gould, for appellant.

D. N. Mortland, for appellee.

APPLETON, C. J. This is an appeal from a decree of the judge of probate disallowing the will of Archelaus Smalley.

Bart K. Smalley, a son of the testator and a legatee under the will to the amount of one dollar, was an attesting witness to the same. It is conceded that had there been no will his interest as heir-at-law would have been greater than that under the provisions of the will.

The will is contested on the ground that he was not a competent attesting witness.

The statute relating to the attestation of wills has undergone various verbal changes in the different revisions of the statutes.

By the statute of 1821, chap. 38, § 2, a will to be valid must "be attested and subscribed in the presence of the testator by three credible witnesses."

In the revision of 1857, chap. 74, § 1, a will to be valid must be subscribed "by three disinterested and credible attesting witnesses."

In 1859, by chap. 120, section first of chap. 74 was amended by striking out the words "disinterested and" and adding thereto "not beneficially interested under the provisions of the will."

In the revision of 1871, chap. 74, § 1, the words "the provisions of" were stricken out so that now a will is required to be witnessed "by three credible attesting witnesses not beneficially interested under said will."

By a series of decisions in England and in this country it has been determined that the word "credible" was used as the equivalent of "competent" so that the question in such case is whether the attesting witness was a competent witness. *Warren v. Baxter*, 48 Me. 193; *Hawes v. Humphrey*, 9 Pick. 361; 20 Am. Dec. 481; *Haven v. Howard*, 23 id. 10; *Carlton v. Carlton*, 40 N. H. 14.

Now in this case Bart K. Smalley is not interested to sustain the will but rather to defeat it. When a witness is produced to testify against his interest, the rule that interest disqualifies does not apply. 1 Greenl. Ev., § 410. A legatee, one of several heirs-at-law of a testator, the validity of whose will is in question, may be called as a witness in support of a will when his interest is manifestly adverse to that of the party calling him. *Clark v. Vorce*, 19 Wend. 232. So, in *Sparhawk v. Sparhawk*, 10 Allen, 155, an heir-at-law, who is disinherited by the will is a competent witness in its support. It is against his interest to support the will and whether entirely or partially disinherited, the same rule must apply so long as it is his interest to defeat the will.

So if it stand indifferent to the witnesses, whether the will, under which they are legatees, and to which they are witnesses, be valid or not, the witnesses, though legatees, are "credible." 10 Bac. Abr. 525 of Wills D. When an attesting witness would take the same interest under a former will to which he was not a witness, as under a later will, he stands indifferent in point of interest and is a good witness to prove the latter will. 3 Stark. Ev. 1692.

It is apparent that Bart K. Smalley, before any change of the statute of 1821, was a credible, that is a competent witness, because his interest would be adverse to the will.

When the word "disinterested" was inserted in the statute, as opposed to interested, the result perhaps might be to exclude an attesting witness whose interest it was to defeat the will.

But whether so or not, when that word was stricken out, and the attesting witness was required to be one not beneficially interested under the will, the obvious intention was to exclude those, who were to receive a benefit under the will, not those, who were pecuniarily losers by its provisions. "The reason why a legatee is not a witness for a will being because he is presumed to be partial in swearing for his own interest;" that reason ceases to exist when his interest is dissevered by such will. *Oxenden v. Penrice*, 2 Salk. 691.

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One who is neither interested to defeat or sustain the will, may well be deemed disinterested. An heir-at-law, who is disinherited in whole or in part is not disinterested in the result, for he has an interest to defeat the will. Hence he is not disinterested in the result.

The change of language was to remedy or rather prevent such conclusion. The witness beneficially interested under the will was one gaining by and under its provisions. But an attesting witness who is called to establish a will by which he is divested of his inheritance can hardly be regarded as beneficially interested by it and so interested to maintain it. One losing an estate by a will under which he is a legatee for a cent or a dollar cannot in any ordinary use of language be considered as a gainer—or beneficially interested, unless a loss is determined to be a gain. As is well remarked by BIGELOW, C. J. in *Sparhawk v. Sparhawk*, referring to *Haven v. Hilliard*, 23 Pick. 10, where it was said to be held that a witness might be incompetent when his interest was adverse to the validity of the will, “certainly so far as it seems to support the proposition that an heir-at-law, who is disinherited in part or in whole by will, is incompetent as an attesting witness, the case is contrary to well-established principles, and must be overruled.”

Undoubtedly, the object in giving this trivial legacy was to guard against the witness taking a portion of the estate under the provisions of section 9, by which a child omitted in the will may have its share of the estate unless such omission was intentional, or such child had had its due proportion of the estate during the life of the testator.

The decree of the judge of probate is reversed, and a decree to be entered that the will be affirmed.

Ordered accordingly.

WALTON, BARROWS, DANFORTH, LIBBY and SYMONDS, JJ.,
concurring.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

COMMONWEALTH V. ALLEN.

(188 Mass. 46.)

Evidence — handwriting — writings made pending trial for evidence.

On the question of the genuineness of a writing alleged to be in the defendant's hand, the court may exclude another writing made by him during the trial, for the purpose of evidence, and offered by him for comparison.*

CONVICTION of arson. A hotel register, said to contain the defendant's entry of certain arrivals, was put in evidence, on his behalf, and he then offered other writings made by him pending the prosecution, for the purpose of being used as evidence, containing the same words as the entry in the register. These were excluded.

C. Cowley (*D. O. Allen* with him), for defendant.

G. Marston, attorney-general, & *F. H. Gillett*, assistant attorney-general, for Commonwealth.

AMES, J. [Omitting other matters.] In the recent case of *King v. Donahue*, 110 Mass. 155; s. c., 14 Am. Rep. 589, it was decided

* See *Besse v. Besse*, *post*.

Commonwealth v. Wardell.

in substance that a party to an action is not entitled to write his signature in the presence of the jury, or to use his signature written for the occasion and *post litem motam*, for the purpose of comparison with a signature, the genuineness of which as his own is in controversy. The defendant's argument invites us to reconsider that decision, and he cites and relies upon the cases of *Qsbourne v. Hesier*, 6 Mod. 167; *William's case*, 1 Lew. 137, and *Regina v. Taylor*, 6 Cox's C. C. 58, which it is suggested were overlooked when *King v. Donahue* was decided. We find nothing, however, in those cases that requires us to overrule or reconsider that decision. The cases cited, and which are presented as inconsistent with *King v. Donahue*, go no further, as we find, on full examination, than to show that under some circumstances presiding judges in their discretion have ordered or allowed signatures to be written in the presence of the jury, and considered by them; not that a judge may not refuse to permit such a signature to be written when the circumstances are such that it does not appear to him to furnish a fair standard of comparison. We see no reason to hold that the presiding judge was bound by law to admit the paper writings offered by the defendant for the purpose of comparison.

Exceptions overruled.

COMMONWEALTH V. WARDELL.

(126 Mass. 52.)

Criminal law — "open and gross lewdness."

The indecent exposure of his person by a man in a house to a girl eleven years' old is "open and gross lewdness and lascivious behavior."

CONVICTION of open lewdness. The opinion states the facts.

COLL, J. The second count in the indictment charges an offense under the Gen. Stats., chap. 165, § 6, which provides punishment for lewd and lascivious cohabitation and for open and gross lewdness and lascivious behavior. No objection was made to the form of the indictment. The evidence at the trial was that the de-

fendant went to a private house, not his own, with some small articles to sell, and finding no one there but a girl of eleven years, and a child of four, proceeded in the presence of both to make an indecent exposure of his person, and that the elder girl, who alone saw it, fled in fright to a neighboring house. This was evidence from which the jury would be fully justified in finding that the exposure was made with evil purpose by the defendant, with the intention that it should be seen by one or both the children present.

The judge declined to rule that the evidence was not sufficient to sustain the charge, and instructed the jury, that if the defendant lewdly, lasciviously, and openly exposed himself to the elder of the two persons named, they would be authorized to find him guilty. We are of opinion that there was no error in this instruction, and that the evidence produced was sufficient to support the verdict.

The conduct of the defendant in thus intentionally, indecently, and offensively exposing himself in the house of another to two girls of tender years, without necessity or reasonable excuse, and in such a way as to produce alarm, proves that he was guilty of gross lewdness and lascivious behavior.

The defendant, however, insists that there was no proof of open lewdness within the meaning of the statute. He relies on the early case of *Commonwealth v. Callin*, 1 Mass. 8, where it was decided that an indictment under this statute would not be supported by evidence of lewdness or lascivious behavior in secret. But in that case the acts proved accompanied acts of sexual intercourse, in which for all that appears both parties participated, without objection, and which both intended should be private, and attempted to conceal. In the case at bar, the conduct of the defendant was intentionally open and public, as distinguished from that which is intended to be private, covered and concealed. It was an act on his part intended to be seen by one or both the persons present; an act likely to become known, certain to offend public decency, and which was observed by at least one of those present. It was an intentional exposure of his person at a time and place and under circumstances calculated to corrupt public morals and offend public decency. It was such open and gross lewdness and lascivious behavior as it was intended by the provisions of the statute to punish.

In *Regina v. Watson*, 2 Cox's C. C. 276, and in *Regina v. Webb*, 1 Denison, 338, it was decided that indecent exposure in the pres-

ence of only one person, although in a place of public resort, no others being able to see it, does not amount to an indictable offense. But in those cases the indictments were for misdemeanors at common law, in which the offense charged must always amount to a common nuisance committed in a public place and seen by persons lawfully in that place. The word "lewdness" at common law means open and public indecency; but as used and qualified in the statute it has a broader sense. It was held to mean, as used in other criminal statutes (Gen. Stat., chap. 165, § 13; chap. 87, § 6), "the irregular indulgence of lust, whether public or private." *Commonwealth v. Lambert*, 12 Allen, 177. See, also, *Commonwealth v. Parker*, 4 id. 313. The statute punishes, not public, but open lewdness. The word "open" qualifies the intention of the perpetrator of the act; it does not fairly imply that it must be public, in the sense of being in a public place, or in the presence of many people. The offense created does not depend on the number present. It is enough if it be an intentional act of lewd exposure, offensive to one or more persons present. To hold otherwise would be to hold that one might commit with impunity any act of indecency, however gross, before any number of individuals successively. The fact that the act in a given case was intended as an act of open lewdness is most commonly proved, it is true, by evidence that it occurred in a public place, or in the presence of many people; but it does not follow that the intentionally open and immodest character of the act may not be equally well proved by other evidence. An indecent act cannot well be public in its character without being open and immodest, and yet it may have both these latter qualities without being in any sense public in its manifestation. In the language of the statute, the word "open" is used as opposed to "secret."

In an early case in Connecticut it was decided, under a statute against lascivious carriage, that a wanton and lascivious act of one person toward and against the will of another of the opposite sex may constitute the offense, although no third person is present. It was declared to be evident from the preamble of the statute, and the plain import of its terms, that it was intended to include all those wanton acts, between persons of different sexes, which are grossly indecent, and which are not otherwise punishable as crimes against chastity and public decency. *Fowler v. State*, 5 Day, 81. And in *State v. Millard*, 18 Vt. 574, it was decided that where a

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man indecently exposes his person to a woman and solicits her to have sexual intercourse with him, against her opposition and remonstrance, his conduct amounts to open and gross lewdness and lascivious behavior within the statute, although no one else was present.

Exceptions overruled.

NEW HAVEN AND NORTHAMPTON COMPANY V. CAMPBELL.

(128 Mass. 104.)

Carrier — lien — delivery of part of freight — right as to balance.

A common carrier, who has delivered part of goods carried without collecting his freight, does not thereby, as matter of law, lose his lien for that freight as against the part undelivered. (*See note, p. 362.*)

ACTION for conversion of personal property. The opinion states the facts. The plaintiff had judgment below.

A. J. Fargo, for defendant.

W. G. Bassett, for plaintiff.

MORTON, J. The declaration contains two counts, alleged to be for the same cause of action. The first is in tort, in the nature of trover, for the conversion of ten barrels of flour. The second is in contract, alleging in substance that the plaintiff had in its possession as a common carrier fifteen barrels of flour transported by it and consigned to the defendant; that it permitted the defendant to take five barrels, claiming and notifying him that it would hold the remaining ten barrels until the freight and advances due to it were paid by him; and that the defendant afterward took and carried away the said ten barrels, thereby becoming liable to pay the plaintiff the amount due it for such freight and advances. The plaintiff's real cause of action was that the defendant carried away the flour without paying the amount of the lien thereon. If he took it with the knowledge that the plaintiff claimed a lien and looked to him for the payment of the freight and charges, a promise to pay would be implied, upon which an action of contract might be

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maintained. If he took it without such knowledge, and without any waiver of the lien by the plaintiff, he would be liable in trover.

[Omitting a minor point.]

As to the remaining part of the case, we have difficulty in ascertaining from the bill of exceptions what questions of law precisely were intended to be submitted to us. The defendant asked the court to rule that "the lien attaches only to the particular goods; that is, a lien cannot attach to the ten barrels for freight on the entire car load. If the evidence fails to show what part of the freight was for the ten barrels, the plaintiff cannot recover." The bill of exceptions then proceeds: "The court declined so to rule, and did rule substantially that the plaintiff's lien attached to the fifteen barrels received by it for the entire sum due the plaintiff for freight of the fifteen barrels and for charges and expenses paid by it upon receiving the goods, and that the plaintiff might have a lien upon the ten barrels remaining after delivery of the five barrels to the defendant for the whole sum due the plaintiff for freight and charges and expenses paid as aforesaid unless the plaintiff had waived or released its lien."

The defendant contends in this court that the Superior Court should have ruled that the lien could not attach to the ten barrels for freight on the entire car load, a large part of which was delivered at New Britain to Clapp, the original consignee of the whole. But it does not appear that the question was raised at the trial.

The bill of exceptions states that Clapp, the original consignee, received the car load at New Britain, and consigned and sent fifteen barrels to the defendant, "charges to follow"; and the bill to Clapp, which was in evidence, was for the transportation of forty barrels of flour, and six tons of feed, "fifteen barrels sent to Plainville with charges." The expression "charges to follow" standing alone is obscure, but we think it sufficiently appears from the bill of exceptions that all parties assumed at the trial, that by the agreement of the parties interested, the lien upon the whole car-load followed and attached to the fifteen barrels sent to the defendant. The request of the defendant and instructions given in reply thereto were directed, not to the question whether the plaintiff had a lien upon the fifteen barrels for the freight and charges upon the whole car load, but to the point as to what was the effect upon such lien of

the delivery to the defendant of five barrels out of the fifteen. Upon this point, the ruling that the plaintiff might have a lien upon the ten barrels remaining, for the whole sum due for freight and advances upon the fifteen barrels, unless it had waived or released its lien, was correct.

The whole lien attaches to each and every part of the goods subject to it. If not discharged or waived, it remains attached to whatever part of the property may remain within the possession of the carrier. *Ware River Railroad v. Vibbard*, 114 Mass. 447; *Lane v. Old Colony & Fall River Railroad*, 14 Gray, 143. A delivery of part of the property does not necessarily discharge the lien, either in the whole or *pro tanto*. It releases the part delivered from the lien, but does not discharge the part remaining from the burden of the whole lien, unless it was the intention of the parties to do so. *Lane v. Old Colony & Fall River Railroad*, *ubi supra*. And this is ordinarily a question of fact for the jury. In the case at bar, it was for the jury to decide whether the delivery of the five barrels under the order from Clapp, and the sending the bill to Clapp, was a waiver by the plaintiff of its lien upon the flour. This question was submitted to them under instructions which were not objected to, and the defendant upon this part of the case has no ground of exception.

The defendant now contends that no verdict could be rendered on the count in tort, because there was no evidence of the value of the flour. Without conceding the soundness of his position, it is enough to say that this question was not raised at the trial, and it cannot be raised for the first time in this court.

Exceptions overruled.

NOTE BY THE REPORTER. — In *Hensel v. Noble*, Pennsylvania Supreme Court, Oct. 1880, it was said: "It cannot be doubted that a lien is given by the common law to a tradesman or artisan who in the course of his trade or occupation receives personal property upon which he bestows labor, etc., and his right to a lien on the property is equally good whether there be an agreement for a stipulated price, or only an implied contract to pay a reasonable compensation. Story on Bailm., §§ 440, 441, a; *Mathias v. Sellers*, 5 Nor. 438. It is equally clear on principle as well as authority that where there is an entire contract for making or repairing several articles for a gross sum, the tradesman has a lien on any one or more of the articles in his possession, not only for their proportionate part of the sum agreed upon for repairing the whole, but for such amount as he may be entitled to for labor, etc., bestowed upon all the articles embraced in the contract. *Blake v. Fishelson*, 3 Maule & Sel. 167; *Chase v. Westmore*, 5 Id. 180."

SMALL V. HOWARD.

(128 Mass. 131.)

Negligence — malpractice — country surgeon — degree of skill requisite.

A country physician and surgeon is not bound to the exercise of that high degree of art and skill possessed by eminent surgeons living in large cities and making a specialty of the practice of surgery, but only to that reasonable degree of learning, art and skill ordinarily possessed by others learned in his profession, having regard to the advanced state of the science.

ACTION against a surgeon for malpractice in treating a wound. The wound was very severe and required considerable skill. The defendant was a physician and surgeon in Ohelmsford, a town of about 2,500 inhabitants, and had no experience in surgery beyond that of ordinary country surgeons. An eminent surgeon resided within four miles of the defendant. The treatment lasted some ten days, and the plaintiff was physically able to have visited any other surgeon, but was not so directed. One expert called by the plaintiff testified that he did not think the average country surgeon would be likely to possess the skill requisite for this case. The evidence of the experts as to the treatment was conflicting. Other facts appear in the opinion. The defendant had judgment below.

G. A. Torrey, for plaintiff, cited *Leighton v. Sargent*, 7 Fost. 460; *Landon v. Humphrey*, 9 Conn. 209; *Wilmot v. Howard*, 39 Vt. 447; *Hathorn v. Richmond*, 48 id. 557; *Uiley v. Burns*, 70 Ill. 162; *Barnes v. Means*, 82 id. 379; *Branner v. Stormont*, 9 Kans. 51; *Carpenter v. Blake*, 17 N. Y. Sup. Ct. 858; *Heath v. Glisan*, 3 Oreg. 64; *Gallagher v. Thompson*, Wright, 466; *McCandless v. McWha*, 22 Penn. St. 261; *Haire v. Reese*, 7 Phila. 138.

H. B. Staples, for defendant.

AMES, J. The complaint of the plaintiff is, that in the treatment of the wound under which he was suffering, the defendant did not furnish that degree of skill, learning and experience which was required of him, and which, in undertaking the case, he impliedly bound himself to furnish. It is not contended that he

engaged to furnish extraordinary skill, or that he warranted a cure, but that in undertaking the case he held himself out as being a man of reasonable and ordinary skill and experience in his profession as a surgeon. His contract, as implied by law, is, so far as this point is concerned, that he possesses that reasonable degree of learning, skill and experience which is ordinarily possessed by others of his profession. *Leighton v. Sargent*, 7 Fost. 460. It must be the ordinary skill, learning and experience of the profession generally. *Wilmot v. Howard*, 39 Vt. 447. And in judging of this degree of skill in any given case, regard is to be had to the advanced state of the profession at the time. *McCandless v. McWha*, 22 Penn. St. 261.

The instructions which were given upon this subject were in conformity to these principles, and the jury were distinctly told, that in their estimate of the reasonable skill ordinarily possessed by others in the profession, regard was to be had to the present advanced state of the science of surgery. The plaintiff, however, complains that the rule, as given by the presiding judge, lowers the standard of learning and skill required for the practice of medicine and surgery, by including in the expression, "others in the profession," all the mountebanks, ignorant pretenders, and impostors who undertake the practice of medicine and surgery as their ordinary calling. The judge in his charge was speaking of the "profession," of the "advanced state of the science of surgery," and of the "learned professions." These terms clearly imply study, education and special preparation. They have no application to persons, who, without education, and nothing to guide them but some pretended inspiration of their own, usurp the name and seek to assume the character of physicians and surgeons. The instruction upon this general subject was safer and more accurate than that requested by the plaintiff. "The degree of learning, skill and experience ordinarily possessed by the profession," is a more distinct and less speculative and misleading form of expression than "the skill and learning possessed by well-educated surgeons." The instructions requested by the plaintiff were therefore properly refused. The jury could hardly have supposed that the skill required of the defendant was merely the average skill of all practitioners, educated and uneducated, permanent and occasional, regulars and interlopers alike.

One other point remains to be considered. It is a matter of

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common knowledge that a physician in a small country village does not usually make a specialty of surgery, and however well informed he may be in the theory of all parts of his profession, he would, generally speaking, be but seldom called upon as a surgeon to perform difficult operations. He would have but few opportunities of observation and practice in that line such as public hospitals or large cities would afford. The defendant was applied to, being the practitioner in a small village, and we think it was correct to rule, that "he was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practicing in similar localities, with opportunities for no larger experience, ordinarily possess; and he was not bound to possess that high degree of art and skill possessed by eminent surgeons practicing in large cities, and making a specialty of the practice of surgery."

At the plaintiff's request, the court ruled in substance that if the case was one which the defendant was not qualified to undertake, he should have referred the plaintiff to a more skillful surgeon. The remark of the presiding judge, that the rule as to ordinary skill applied equally to mechanical operations and employments not included within the range of the learned professions, was merely an illustration, and could not have misled the jury. No wrong was done to the plaintiff in the trial, and the exceptions are overruled.

Exceptions overruled.

GERRISH V. NEW BEDFORD INSTITUTION FOR SAVINGS.

(126 Mass. 129.)

Gift — savings bank deposit.

D. deposited in a savings bank in his own name all he was permitted under the rules, and then made three other deposits as trustee, one for his only son, the others for his grandchildren, taking separate bank books, which he never delivered, but which were found among his effects on his death. He received the dividends during his life. The rules provided that he must produce the books to receive dividends, in order that they might be entered and that any depositor might designate the person for whose benefit he made deposit, which should bind his legal representatives. The son and grandchildren offered to prove that he had told each of them that he had made and intended the deposits for them after his death, but he wanted to draw the interest during his life. *Held*, competent, and to justify a finding of a complete and effectual trust.

ACTION to recover a bank deposit. The opinion states the facts.

G. Marston, for plaintiffs.

E. Robinson, for defendants.

COLT, J. The executors of John B. Dornin seek to recover of the defendant bank money deposited by him. It appears that after depositing in his own name and on his own account all that he was allowed to by the rules of the bank, he made three other deposits as trustee, one of which was in trust for his only son by name, and the others in trust for his two granddaughters by name. For these three deposits he took separate bank books containing entries of the same, which after his death were found among his effects, having never been delivered to the parties named or to any one else for them. The testator continued while living to collect, receipt for and use as his own all dividends declared upon these deposits.

Under the provisions of Statute of 1876, ch. 203, § 19, the son and grandchildren are made defendants in this action, and appear as claimants of the money.

A by-law of the bank provides that "no person shall receive any part of the principal or interest without producing the original books, in order that such payments may be entered thereon." And another by-law declares that "any depositor, at the time of making his deposit, may designate the person for whose benefit the same is made, which shall be binding on his legal representatives." It is also now provided by statute that when a deposit is made in trust, the name and residence of the person for whom it is made shall be disclosed, and the deposit shall be credited to the depositor, as trustee of such person, and when no other notice of the terms of the trust shall have been given in writing, the deposit or any part thereof may be paid in the event of the death of the trustee to the person for whom the same was made. Stat. 1876, ch. 203, § 20.

At the trial the claimants offered to prove, in addition to the facts stated, that the testator had said to each of them at different times, "that he had put this money in the bank for them; that he wanted to draw the interest during his life-time; and that after he was gone they were to have the money." And the question submitted by this report is whether, upon this evidence, the claimants would be entitled to the money in dispute; in other words,

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whether, upon this evidence, it can be properly found that the testator created himself trustee of the several funds for their use and benefit.

It is not enough that the testator manifested an intention to create the trust and make the gift at some future time. The act of transfer relied on must be fully and completely executed. When there is a formal instrument creating a trust in real estate, it is said that delivery of the writing is not in all cases necessary to its validity. It is a question of fact whether the trust has been perfectly created, and upon that question, the delivery or non-delivery of a written declaration is a significant fact of greater or less weight according to circumstances and according to the nature of the writing relied on as a declaration of trust. If the alleged trust arises from a mere gift of personal property, delivery of the writing by which it is declared is perhaps of less importance, and the court will consider all the facts showing the intention of the donor. It must always appear, however, from the written or oral declarations, from the nature of the transaction, the relations of the parties and the purpose of the gift, that the fiduciary relation is completely established. *Urann v. Coates*, 109 Mass. 581.

There is in the case at bar no formal written declaration. But no particular form of words is required to create a trust in another, or to make the party himself a trustee for the benefit of another. It is enough for the latter purpose if it be unequivocally declared in writing, or orally if the property be personal, that it is held in trust for the person named. *Ex parte Pye*, 18 Ves. 140; *Wheatley v. Purr*, 1 Keen, 551; *M'Fadden v. Jenkyns*, 1 Hare, 458, and 1 Phillips, 153; *Milroy v. Lord*, 4 De G., F. & J. 264. When the trust is thus created, it is effectual to transfer the beneficial interest, and operates as a gift perfected by delivery.

The decisions in both the English and American courts in these cases are not entirely uniform. The difficulty is in the application of the rule to the varying facts of each case. In *Brabrook v. Boston Five Cents Savings Bank*, 104 Mass. 228, where one deposited his own money in his own name as trustee for another, but retained the bank book, and never gave to the alleged donee any notice of the deposit; and there was evidence that it was made in that mode in order to evade a by-law of the corporation, which prohibited so large a deposit in the name of one person, it was decided by this court that the facts agreed showed no intention on the part of the

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depositor to transfer to the plaintiff a present title to the property. The decision was upon a case stated, and much reliance was placed upon the fact that the whole transaction was a voluntary act, to which the plaintiff was in no way party or privy, and of which she had no notice. It was said that "even if the form of the deposit is to be taken as conclusive proof of the existence of such an intention in his mind, the execution of that intent was not so far complete as to operate to pass the title," but that it appeared "that the form of the deposit was adopted for the sole purpose of evading a by-law of the bank and a provision of the statutes limiting the amount that could be received from any one depositor to one thousand dollars." The case of *Clark v. Clark*, 108 Mass. 522, which was held to be governed by *Brabrook's* case, was like that case in the fact that the claimant was not a party to the transaction, and had no notice or knowledge of the deposit until after the death of the depositor.

In each of those cases, the evidence relied on failed to disclose the nature or extent of the fiduciary relation intended to be assumed by the party making the deposit. The entries in the bank books were alike consistent with a trust to collect and pay over only the income of the fund for a definite period; or with a trust by which the principal sum vested in the donees, with an immediate or future right to all income; or with a mere naked trust, by which an immediate title to the money and all its future income vested in them. The money in each case belonged to the depositor, who was under no previous obligations to hold it for the claimants, and above all, the claimants were not made parties to the transaction, and had no knowledge or notice of it. The transaction, so far as it tended to create a trust, was in each case incomplete. It failed to show that the depositor did not intend to keep the money in his own hands, and indicated that while he lived, he did intend that no one should take from him any interest in it, either immediately or on the happening of some future event. The entries in the bank books did not possess the character of completed and fully executed declarations of trust. So in *Cummings v. Bramhall*, 120 Mass. 552, where a testator transferred certain bank shares to himself as trustee for his two daughters, but retained control of the shares and appropriated the dividends, and neither daughter knew of the transfer, it was held that there was no completed gift. See, also, *Powers v. Provident Institution for Savings*, 124 Mass. 377.

In *Milroy v. Lord*, above cited, it was declared by Lord Justice TURNER to be well settled that in order to make a voluntary settlement valid and effectual, the settler must have done every thing, which, according to the nature of the property comprised in the settlement, was necessary in order to transfer the property and render the settlement binding upon him; that he may do this by an actual transfer of the property to the person for whom he intends to provide; and it will be equally effectual if he transfers it to a trustee, or declares that he himself holds it in trust for the purpose named. And in *Warriner v. Rogers*, L. R., 16 Eq. 340, it is said that in order to give validity to a declaration of trust in these cases it is necessary that the donor or grantor should have absolutely parted with his property and have effectually put it out of his power, at least in the way of interest. See, also, *Richards v. Delbridge*, L. R., 18 Eq. 11.

In the case at bar the claimants offered to prove declarations of the testator made to them at different times in language which fairly implied that he intended to give to them an immediate equitable title in the principal fund, reserving only the income for life. These declarations define the nature of the trust assumed, and show that a testamentary disposition of the property was not intended. See *Davis v. Noy*, 125 Mass. 590; s. c., 28 Am. Rep. 272.

At the trial this evidence was rejected, because in the opinion of the judge the testator had not done what was necessary to create a trust. But whether he had done enough depended, as we have seen, on whether his conduct and declarations manifested a completed and executed intention in regard to it. Notice to the donee is indeed not necessary when other acts or declarations of the donor are sufficient and complete in themselves; but where the transaction is capable of two interpretations and the settlement is merely voluntary, it is plain that notice given by the donor to the donee of the existence of the trust would in most cases be decisive on the question of intention. It takes the place of that delivery which is necessary to perfect a gift of personal property. It is not only satisfactory evidence of an executed intention, but it is a declaration in the nature of an act necessary to complete the transaction and create the trust.

In *Ray v. Simmons*, 11 R. I. 266; s. c., 23 Am. Rep. 447, where money was similarly deposited, the fact that notice was given to the plaintiff was relied on as showing that the trust was completely

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constituted. In *Minor v. Rogers*, 40 Conn. 512; s. c., 16 Am. Rep. 69, notice given to the parents of an infant of a deposit in trust for him was treated as evidence of an executed gift. And the New York Court of Appeals, differing from the view of this court, recently decided that an entry in a savings bank pass-book was alone sufficient to constitute a valid trust against legal representatives, although the donor received the income during life and the donee knew nothing of the deposit. *Martin v. Funk*, 75 N. Y. 134; s. c., 31 Am. Rep. 446. See, also, *Taylor v. Henry*, 48 Md. 550; s. c., 30 Am. Rep. 486; *Stone v. Bishop*, 4 Cliff. 593.

Upon all the evidence, including that which was excluded but which should have been admitted, a majority of the court is of opinion that a jury would be justified in finding that the testator had fully constituted himself a trustee for these claimants; and according to the terms of the report the entry must be,

New trial granted.

GREEN V. BOSTON AND LOWELL RAILROAD COMPANY.

(186 Mass. 221.)

Carrier — exemption — "articles of great intrinsic value" — portrait — measure of damages.

A family portrait is not an article of "great and intrinsic value," when coupled in an exemption clause in a carrier's receipt, with "specie, drafts, and bank bills;" but the measure of damages for its loss is the value to the owner and not the market value, and so evidence that it was the only one extant would be competent.

ACTION against a carrier for the value of an oil painting of the plaintiff's father, intrusted to it for carriage, and lost. The opinion states the facts. The plaintiff had judgment below.

D. Saunders and C. G. Saunders, for defendant.

A. C. Stone (C. U. Bell with him), for plaintiff.

MORTON, J. [Omitting other matters.] The contract between the parties contains the following provision: "No responsibility will be admitted, under any circumstances, to a greater amount,

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upon any single article of freight than \$200, unless upon notice of such amount and a special agreement therefor. Specie, drafts, bank-bills and other articles of great intrinsic or representative value, will only be taken upon a representation of their value, and by a special agreement assented to by the superintendent." The defendant asked the judge to rule, that as the plaintiff had not given notice of the value of the lost case, and had made no special agreement as to its transportation, assented to by the superintendent, he could not recover.

The plaintiff admitted that the first clause of this provision applied to this case, and claimed and recovered only a verdict for \$200. The other clause does not specify portraits as articles which will be taken only upon a representation of their value and a special agreement. It specifies "specie, drafts, and bank-bills." In determining the meaning of the words "other articles of great intrinsic or representative value," the rule *noscitur a sociis* applies; the general words following the particular enumeration must be held to include only articles of the like kind.

A portrait is not an article of great intrinsic or representative value, like specie or drafts or bank-bills, and therefore the Superior Court rightly refused to rule as requested in the first and second prayers of the defendant.

The defendant asked the court to rule that "the plaintiff can recover only a fair market value of the article lost." The general rule of damages in trover, and in contract for not delivering goods, undoubtedly is the fair market value of the goods. But this rule does not apply when the article sued for is not marketable property. To instruct a jury that the measure of damages for the conversion or loss of a family portrait is its market value would be merely delusive. It cannot with any propriety be said to have any market value. The just rule of damages is the actual value to him who owns it, taking into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner. *Stickney v. Allen*, 10 Gray, 352. The court properly refused to give the instruction requested, and we are to presume gave proper instructions instead thereof. This being the rule of damages, the testimony of the plaintiff that he had no other portrait of his father would bear upon the question of its actual value to him and was competent.

[Omitting other matters.]

Exceptions overruled.

Fay v. Harlan.

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(138 Mass. 244.)

Evidence — declarations of patient to physician.

In an action of assault and battery, the attending physician of the plaintiff may testify as to the plaintiff's complaints and statement of symptoms made to him for the purpose of medical treatment and advice, and also as to his own observation of his indications of suffering.*

ACTION of assault and battery. On the trial the plaintiff's attending physician was allowed to testify as to the plaintiff's complaints of suffering, during his attendance on him for the injury in question, and as to indications or symptoms of suffering which he himself observed. The plaintiff had judgment below.

G. W. Searle & J. L. Eldridge, for defendant.

T. Riley, for plaintiff.

AMES, J. It is well settled that the declarations of a patient, as to his symptoms and complaints, to his physician, for the purpose of medical treatment and advice, are competent and admissible in evidence. They are not to be considered as mere hearsay, if made with a view to be acted on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to adhere to the truth. *Barber v. Merriam*, 11 Allen, 322. All other visible symptoms and indications manifesting pain and suffering stand upon the same ground. The weight and value of such evidence are for the jury to determine in each case.

[A minor matter omitted.]

Exceptions overruled.

* To same effect, *Quat's v. Chicago & N. W. Ry. Co.* (48 Wis. 512), 33 Am. Rep. 381, and note, 383.

MCNEIL V. KENDALL.

(128 Mass. 245.)

Landlord and tenant — under-lease — assignment.

Where a lessee leases a part of the premises to another, for the remainder of his term, with easements in the other part, this is an under-lease, and not an assignment.

ACTION for rent. The opinion states the point.

A. A. Ranney, for plaintiff in first case, and for defendants in second case.

J. B. Ames, pro se, and for defendants in first case.

ENDICOTT, J. In the first of these cases McNeil, the plaintiff, as assignee under a levy of sale of the leasehold estates of Samuel T. Ames, created under certain indentures from Lucy Ann Harris, seeks to recover rent from the defendants, to whom Samuel T. Ames had leased, prior to the sale, a portion of the premises included in the indentures.

In the second case, James B. Ames, the plaintiff, contends that the lease from Samuel T. Ames to the defendants operated in law as an assignment of his entire term in the premises described therein, and not as an under-lease; and that there was no estate or reversion in those premises remaining in Samuel T. Ames which could be levied upon and sold. Under an assignment, therefore, after the levy and sale, made to him by Samuel T. Ames of the rent reserved in the defendant's lease James B. Ames seeks to recover the same from the defendants.

[Omitting consideration of facts.]

It is unnecessary to cite authorities to the proposition, that to constitute an assignment by a lessee of the whole, or of a specific part of his leasehold estate, the entire interest of the lessee in all the premises included in the assignment must pass to the assignee. Even if the instrument may be in form a sub-lease, yet if it conveys the whole estate it will operate as an assignment. In deciding, therefore, whether this lease to the defendants is in law an assign-

ment, we must ascertain from all its provisions, as applied to the subject-matter, whether Samuel T. Ames conveyed his entire term and interest in the premises, which the defendants have the right to occupy and enjoy under their lease from him.

What then passed to the defendants from Samuel T. Ames? The land under the building, the building itself, the right to use the passageway in the rear extending to Lincoln street, the right to enjoy the light in the area, secured by the provision that the space above the two-story building on Lincoln street shall remain open and unobstructed. These were not mere personal rights, but easements appurtenant to and a part of the premises conveyed, and necessary for the complete enjoyment of that portion which opened on the area. *Dennis v. Wilson*, 107 Mass. 591; *Peck v. Conway*, 119 id. 546. And if Samuel T. Ames or those claiming under him had raised the building on Lincoln street higher than two stories, the defendants would have been entitled to relief in equity to enforce the restriction. *Parker v. Nightingale*, 6 Allen, 341. The defendants thus acquired the whole interest in the warehouse on Summer street and the land on which it stood, and subordinate and limited interests in all the other land between the warehouse and Lincoln street. These cannot be separated or divided, but form one estate, carved out of the whole leasehold estate of Samuel T. Ames acquired from Lucy Ann Harris.

It is plain, therefore, that Samuel T. Ames, while he conveyed to the defendants his whole term for years, did not convey his whole interest in the premises, which the defendants had the right to occupy and enjoy under their lease; but retained in himself all the land, not covered by the warehouse on Summer street, subject to the easements granted to the defendants. The interest which he conveyed to the defendants was a portion of the entire estate, and not his whole estate in a portion of the same. "For there is a diversity between the whole estate in part, and part of the estate in the whole, or of any part." Co. Lit. 385 a; Shep. Touchst. 199.

While this case differs in many of its features from that of *Patten v. Deshon*, 1 Gray, 325, yet the point there determined is decisive of this, independently of the considerations stated above. In that case, one Walker, a lessee for years, had given a lease in a portion of the premises by metes and bounds, for his entire term, to the defendant, and afterward assigned all his right, title and interest in his lease to the plaintiff; and it was held that the plaintiff could

recover from the defendant the rent accruing upon his lease. Chief Justice SHAW in delivering the judgment said: "It would be too narrow a construction to hold that this was only an assignment of the instrument or document; it means all the right, title and interest, which he holds, or has title to hold, under the instrument. It clearly embraced the transfer of all right to the use and enjoyment, for the residue of the term, of all that part of the leased premises which had not been underlet to Deshon. Had the sub-lease to Deshon been surrendered, or forfeited by non-payment of rent, the assignment would have passed to the assignee the right to use and enjoy that part of the premises let to Deshon, for the residue of the term. It was therefore a substantial interest intended to be assigned." "And it is to be considered, that Patten, the plaintiff, by force of that assignment of Walker to him, for the whole term, had become assignee of the lessee, and as such liable to the action of the original lessor for the entire rent. In order to enable him to meet that obligation, equity required that he should have the entire benefit of the term, including not only the use and occupation of the part not underlet, but also the rent accruing from sub-lessees, of all such parts of the premises as were held by them; and therefore it must have been the intention of the parties, in the assignment, that the assignee should take upon himself the burden of paying the whole rent, and be entitled to the benefit of the whole of the leased premises; and that Walker, the original lessee and assignor, being relieved from the payment of any rent to the original lessor, could have no right to receive rent of a sub-lessee."

In the case at bar, McNeil acquired under the levy and sale all the right, title and interest of Samuel T. Ames in a considerable portion of the leasehold estate not let to the defendants. By the terms of the lease to the defendants, Samuel T. Ames had the right to re-enter if the defendants failed to pay rent, or committed strip or waste, and this right passed to McNeil under the conveyance from the sheriff of all the right, title and interest of Samuel T. Ames in the leasehold estates.

We are not aware that the decision in *Patten v. Deshon* has ever been judicially questioned; nor has any case been called to our attention, in which, upon the same state of facts, a different rule has been declared. It has been cited with approval in numerous cases in our own reports; it has been the law in Massachusetts for more than twenty years, and lays down a just and equitable rule, not incon-

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sistent with the established principles of law. *Buffum v. Deane*, 4 Gray, 385, 393; *Hunt v. Thompson*, 2 Allen, 341; *Way v. Reed*, 6 id. 364; *Sanders v. Partridge*, 108 Mass. 558, 560; *McNeil v. Ames*, 120 id. 481; *Porter v. Merrill*, 124 id. 534; *Farrington v. Kimball*, 126 id. 313. See, also, *Shumway v. Collins*, 6 Gray, 227.

The plaintiff, McNeil, entered upon the premises after the sale, notified Lucy Ann Harris of his assignment, and that he would pay rent to her; and also gave notice to the defendants that they must pay rent to him; and we are of opinion, for the reasons stated, that he is entitled to recover. It therefore becomes unnecessary to consider the other questions so ably argued at the bar, or to review the numerous cases cited by the counsel. By the terms of the report, in the first case the exceptions must be overruled; and in the second case the entry must be

Plaintiff nonsuit.

GEORGE V. GOBEY.

(128 Mass. 299.)

Master and servant — responsibility of master for illegal act of servant forbidden by him.

A master is civilly liable to a statutory penalty for an illegal sale of intoxicating liquor made by his servant, without his knowledge or consent, and against his instruction.*

ACTION for a penalty. The opinion states the facts. The plaintiff had judgment below.

J. Hopkins, for defendant.

J. E. Day, for plaintiff.

SOULE, J. At common law the master is responsible for the wrongful acts of his servant done in the execution of the authority given by the master, and for the purpose of performing what the master has directed, whether the wrong done be occasioned by the

* See note, 25 Am. Rep. 303.

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mere negligence of the servant, or by a wanton and reckless purpose to accomplish the master's business in an unlawful manner. But if the servant goes outside the scope of his employment and does a wrongful act, for a purpose of his own, and not in the performance of his master's business, the master is not responsible for such act. *Howe v. Newmarch*, 12 Allen, 49; *Ramsden v. Boston & Albany Railroad*, 104 Mass. 117; s. c., 6 Am. Rep. 200; *Hawks v. Charlemont*, 107 Mass. 414; *Hawes v. Knowles*, 114 id. 518; s. c., 19 Am. Rep. 383; *Levi v. Brooks*, 121 Mass. 501. The fact that the act done is contrary to an express order of the master will not exonerate him. *Philadelphia & Reading Railroad v. Derby*, 14 How. 468.

We see no reason why the general principle which governs the responsibility of the master for the acts of his servant should not apply in the case at bar. The action is brought under a statute which makes that a tort which was not so before, and provides for the recovery of damages against the tortfeasor. The tort consists in selling intoxicating liquor to one who has the habit of using it to excess, after notice of his habit and a request from his wife not to sell such liquor to him. The defendant engages in the business of selling liquor voluntarily. He chooses to intrust the details of the business to a servant. If he forbids the making of sales to the intemperate person, and his servant negligently, through forgetfulness of the instruction given him, or through a failure to recognize the person, continues to make sales to that person, there is no reason why the defendant should not be responsible for the wrongful act. The sale is his sale, made in the performance of his business, and is an act within the general scope of the servant's employment. The ruling which the defendant asked was properly refused. It does not state a combination of circumstances which would relieve the master from responsibility.

It is to be borne in mind that this is a civil action, and that the rules which govern it differ from the rules which govern criminal proceedings. *Roberge v. Burnham*, 124 Mass. 277.

What would be the result if it appeared that the servant, knowing the instruction given by his master, made the sales with the intention of disobeying him, and for his own purposes, and not for the purpose of doing his master's business, we have not considered, because that question is not before us. And we have treated the ruling asked for as intended to present the case of instructions given to the servant in good faith; for it would hardly be contended

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that instructions not to sell, which both master and servant understood to be a mere form of words, exonerated the master from the consequence of a wrongful sale made by the servant.

Exceptions overruled.

DOLLIVER V. ST. JOSEPH FIRE AND MARINE INSURANCE COMPANY.

(128 Mass. 315.)

Insurance — fire — statement of interest and ownership — mortgage.

A fire policy was conditioned to be void upon a decree of foreclosure, or in case the interest of the insured was not truly stated, or was any other than the entire, unconditional and sole ownership of the property. The property was subject to an existing and undisclosed mortgage and a lease for years. *Held*, no breach.*

ACTION on a policy of fire insurance. The opinion states the case. The defendant had judgment below.

S. B. Ives, Jr. & L. S. Tuckerman, for plaintiffs.

A. S. Wheeler, for defendant.

Soule, J. The plaintiffs are the assignees in bankruptcy of Abraham Day, who, being the owner in fee of the buildings described in his policy, subject to certain mortgages and to a lease running for about three and one-half years, obtained the policy sued on; and the buildings having been destroyed by fire, bring this action to recover the amount for which they were insured. The plaintiffs were appointed assignees after the loss. The defendant contended,* and the chief justice at the trial ruled, that the action could not be maintained, because no mention is made in the policy of the incumbrances on the title to the property destroyed. This ruling was based on the following provision of the policy: "4. If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, or if the building insured

* See *Byers v. Farmers' Ins. Co.*, post.

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stands on leased ground, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void." This provision is in the body of the policy, and is inserted for the benefit of the insurer. It is to be construed strictly against it, and liberally in behalf of the assured. If, therefore, its terms can be satisfied by a construction which will save the policy, and at the same time accord with the established rules of law, such construction must be adopted.

It has long been settled in this Commonwealth, that as to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands, at least till the mortgagee has entered for possession. *Willington v. Gale*, 7 Mass. 138; *Waltham Bank v. Waltham*, 10 Metc. 334; *White v. Whitney*, 3 id. 81; *Ewer v. Hobbs*, 5 id. 1; *Henry's case*, 4 Cush. 257; *Howard v. Robinson*, 5 id. 119; *Buffum v. Bowditch Ins. Co.*, 10 id. 540; *Farnsworth v. Boston*, 126 Mass.

1. This being the law, and the mortgagees not being in possession of the premises, the plaintiff's assignor might well be described in a policy of insurance as the owner of the property insured; and inasmuch as his estate was in fee simple, not an estate for life, and not a base, qualified or conditional fee, it might well be described as the entire and unconditional ownership; and as he had no joint tenant nor tenant in common, his estate was well described as the sole ownership. As between him and the defendant, the mortgages and the lease were mere incumbrances on his title, not affecting its character as entire, and not changing it from an absolute to a conditional estate or ownership. Even as between him and the mortgagees, the mortgagees' estate was the conditional one, determinable by satisfaction of the condition set out in the mortgage deed. There was no joint tenancy nor tenancy in common of the mortgagor and the mortgagees. All the characteristics of such tenancies are lacking in their relations to the property.

The lease for years created only a chattel interest in the premises, not affecting the ownership of the fee. It was merely an incumbrance. It has been held by the Supreme Court of the United States, in a recent case, that an outstanding lease did not invalidate a policy in which the ownership of the assured was described as entire, unconditional and sole. *Insurance Co. v. Haven*, 95 U. S. 242. And we do not understand that the ruling in the case at bar was supposed to rest on the existence of the lease.

The policy sued on provides, in the condition numbered 1 that,

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"if the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or on a sale under a deed of trust, or if the property be assigned under any bankrupt or insolvent law, or any change takes place in title or possession, * * * or if the interest of the assured, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in the policy, the policy is void." It is evident from the first branch of this condition, that the parties did not intend that the placing of a mortgage on the insured property should be regarded as a change of title, or have any effect on the rights of the parties to the contract of insurance, but that the entry of a decree for foreclosure should avoid the policy, although such decree would not destroy the insurable interest of the mortgagor. The language of the second branch of the condition excludes the idea that a mortgagee or a lessee is to be regarded as in any sense an "owner" of the property, and the whole condition numbered 1 aids in arriving at the construction of the condition numbered 4, on which the defendant relies. *Jackson v. Massachusetts Ins. Co.*, 23 Pick. 418. The plaintiff's assignor owned the fee. There was no adverse interest in the property, except that of the mortgagees and the lessee. The policy in its terms indicates that mortgaging the property is not intended to affect the policy, though a decree for foreclosing a mortgage shall avoid it. Furthermore the policy discriminates between owners and the holders of incumbrances, and nowhere contains any language which indicates that mortgagees or lessees are to be regarded, for any purposes of the policy, as owners of the property.

It is to be borne in mind, further, that the terms of the condition relied on by the defendant are not those which would naturally direct the attention of the insured to the question whether or not his estate is incumbered. If the defendant intended that the validity of the policy should be affected by the failure to mention existing incumbrances, that intention could easily have been made clear by inserting the word "unincumbered," or other phrase equivalent thereto, in the fourth condition of the policy, after the word "sole." It has already been held by this court that a requirement of the policy that the proof of loss should state the "whole value and ownership of the property insured," did not require any statement as to incumbrances, the property being under mortgage. *Taylor v. Aetna Ins. Co.*, 120 Mass. 254. In Tennessee, it has

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been held that the assured, who had bought the property and given the seller a lien for part of the purchase money, was the unconditional and sole owner of it. *Manhattan Ins. Co. v. Barker*, 7 Heisk. 503.

This case does not require us to consider whether a subsequent mortgage should be regarded as "a change of title," which would avoid a policy containing nothing to explain the sense in which those words were used. See *Edmonds v. Mutual Safety Ins. Co.*, 1 Allen, 311; *Shepherd v. Union Ins. Co.*, 38 N. H. 232; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; s. c., 4 Am. Rep. 582; *Hartford Ins. Co. v. Walsh*, 54 Ill. 164; s. c., 5 Am. Rep. 115.

On consideration, we are all of opinion, that on the peculiar language of the policy sued on, the ruling that the interest of the assured was not sufficiently expressed in the policy, and that the policy was therefore void, was erroneous. The case must therefore

Stand for trial.

MURPHY V. LOWELL.

(123 Mass. 326.)

Municipal corporation—not liable for necessary and careful blasting in street.

A city, authorized to build sewers in its streets, is not liable for damage done by necessary blasting of rocks in the work, unless negligently done by its agents.*

ACTIONS for injuries to person and property occasioned by blasting in construction of a sewer. The defendants had judgment below.

F. T. Greenhalge & W. H. Bent, for plaintiffs, cited *May v. Burdett*, 9 Q. B. 101; *Rylands v. Fletcher*, L. R. 3 H. L. 330; *Shipley v. Fifty Associates*, 106 Mass. 194; s. c., 8 Am. Rep. 318; *Jager v. Adams*, 123 Mass. 26; s. c., 25 Am. Rep. 7; *Hay v. Cohoes Co.*, 2 Comst. 159; *Tremain v. Cohoes Co.*, 2 id. 163.

G. F. Richardson, for defendant.

* Contra, *City of Joliet v. Harwood* (25 Ill. 110), 25 Am. Rep. 27.

AMES, J. Under the law of this State, the mayor and aldermen of the defendant city had authority to lay, make and maintain all such main drains and common sewers as they should adjudge to be necessary for the public convenience or the public health. *Stata. 1869, ch. 111, § 1; Gen. Stata., ch. 48.* As there is no suggestion of any irregularity in the formal preliminary proceedings of the board of aldermen, it must be inferred, that in the construction of the sewer in question, the defendant was acting under this general authority and responsibility. An authority conferred upon municipal corporations or officers to determine where drains shall be built, is in the nature of a judicial power, involving the exercise of a large discretion, and depending upon considerations affecting the public health and general convenience. *Emery v. Lowell, 104 Mass. 13, and cases cited.* The fact that the course or route selected will require the blasting of rocks, thereby subjecting the owners and occupants of adjoining houses to risk and inconvenience, though proper to be taken into consideration by the board of aldermen, is not sufficient to invalidate their decision. The balance of public convenience may still be in favor of the proposed course; and at any rate, the decision of the question is within their authority.

It was ruled at the trial, not merely that the actual construction of the drain must be performed with reasonable care and skill, but that the amount of care must be commensurate with the dangerous nature of the work, that great care must be taken, and that no precaution must be omitted which careful men acquainted with the business ought to exercise in relation to the same. We do not understand that the plaintiffs object to these instructions, so far as they relate to the manner in which the work was to be done. Their complaint is that the court refused to instruct the jury, that "if the defendant or its agents knew that these blasting operations would be dangerous and likely to cause injury to persons or property, notwithstanding all the precautions that could be taken, and injury did result from such blasting operations, then the defendant is liable for all damages resulting from accidents incidental to such operations, provided the parties injured were exercising due care." In other words, as it was pressed upon us in the argument, it was a want of due care at the outset to undertake and enter on such a dangerous work at all, and the defendant became responsible, in this action, for all accidents. This instruction could not properly have been given. If the board of aldermen had a right to say

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where the sewer should be laid (as we cannot doubt they had), and if the city, in its construction, furnished the degree of diligence, care and skill described in the ruling of the presiding judge, no private action of tort can be maintained against it. The cases cited by the plaintiffs are for the keeping of dangerous animals, or for wrongs done by one landholder in improving his own property in such a manner as to injure or destroy that of his neighbor. They furnish no analogy to the cases at bar.

The rulings of the court as to notice of the blasts, and as to the burden of proof, were such as the plaintiffs requested, and were sufficiently favorable to them. The evidence as to the cause of the injury to the dwelling-house, and as to the exercise of due care by the female plaintiff, was conflicting. The verdict of the jury was given upon proper instructions, and has settled both these points in favor of the defendant.

Exceptions overruled.

CUSHING V. CITY OF BOSTON.

(126 Mass. 330.)

Municipal corporation — ordinance — "projections" in streets — door-steps.

A city has no power by ordinance to prohibit door-steps lawfully established in a street under an authority to "make such rules and regulations for the erection and maintenance of balustrades and other projections upon the roofs or sides of buildings as the safety of the public requires," and to make "all salutary and needful by-laws." (*See note, p. 386.*)

ACTION for personal injuries sustained by running against door-steps. The opinion states the point. The plaintiff had judgment below.

E. P. Nettleton, for defendant.

W. Gaston and C. L. B. Whitney (C. S. Lincoln with them), for plaintiff.

ENDICOTT, J. The facts now presented in this case in regard to the position, construction and condition of the steps which constituted the alleged defect in the highway, do not differ from those

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stated in the former bills of exceptions as reported in 122 Mass. 173, and 124 Mass. 434. On both occasions it was held that under the Statute of 1824, ch. 16, § 3, these steps, which projected less than three feet into the highway, and were properly constructed and in good repair, could be lawfully maintained by the abutter, were not a nuisance, and did not constitute an illegal obstruction in the highway. Whether they rendered the highway unsafe for a traveler in the night-time, using due care, was entirely immaterial; they were authorized by law; the defendant could not remove them, and was under no obligation to place railings or other safeguards around them for the protection of travellers. It was also held that it was within the power of the legislature to make this provision in regard to the erection of door-steps within the limits of the highways in Charlestown, and we find nothing in the argument now addressed to us by the plaintiff which leads us to reconsider that question. 122 Mass. 173.

When the case was last before us it appeared that in 1869 the city of Charlestown passed an ordinance which was a re-enactment of a similar ordinance passed in 1849, prohibiting the erection and maintenance of door-steps in the highway without the permission of the mayor and aldermen; but for reasons then stated, it could not properly form any part of the defendant's bill of exceptions. 124 Mass. 434. It is now before us, and the question is presented, whether, under the Gen. Stats., ch. 19, § 13 (re-enacting the Stat. of 1848, ch. 278), by which cities are authorized to make "such rules and regulations for the erection and maintenance of balustrades, or other projections upon the roofs or sides of buildings therein, as the safety of the public requires," Charlestown had the power to pass an ordinance prohibiting the maintenance of door-steps in the highway, which were lawfully there under the provisions of the Stat. of 1824, ch. 16, § 3. In this connection, it is also to be noticed that the city of Charlestown, under its charter was empowered to make "all such salutary and needful by-laws, as towns, by the laws of this Commonwealth, have power to make and establish." Stats. 1847, ch. 29, § 20.

We are of opinion that these statutes did not authorize Charlestown to pass such an ordinance. The power conferred by the Gen. Stats., ch. 19, § 13, is limited to "balustrades or other projections upon the roofs or sides of buildings;" and undoubtedly, under this provision, they may be allowed or forbidden as each city may

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determine. The words "balustrades or other projections," as applied to the roof of a building, would seem to refer to those additions or structures upon the roof, which might under certain circumstances render a highway unsafe for travellers; but it is unnecessary in this case to determine precisely what projections on a roof are included in these words. As applied to the sides of a building, which is the only matter to be considered here, the words "other projections" clearly refer to those portions of, or attachments to, the sides, which are near the line of a highway, or which project over and therefore in one sense into the highway, such as balconies, canopies, widows, cornices, gutters, signs or other additions supported by the building itself, which do not obstruct the travel on the highway. These may project so far as to be insecure, or by reason of the use to which they may be put, or through want of proper repair, may fall and endanger the safety of travellers; and the legislature might well consider them a proper subject of regulation by the authorities of cities.

But the words of the statute are not broad enough to authorize cities to make rules and regulations for the erection and maintenance of door-steps within the actual limits of a highway. Such door-steps, though connected with and a part of the building, are not necessarily supported by it, and are not, properly speaking, projections on the side of it, but are rather structures erected in and occupying a part of the highway itself. The fair construction of the language of this section is, that it intends to deal with those parts of a building which may project near or over the line of a highway, and which, if not properly constructed and maintained, may endanger the safety of the public; and that it does not attempt to deal with those additions to or parts of a building which may occupy the highway itself, or obstruct travel thereon, and thus constitute a nuisance in the highway, if not authorized by law. In other words, cities are authorized to regulate the erection and maintenance of such projecting parts of a building, standing upon or near the line of a highway, which do not in any way obstruct the use of the highway, or constitute a defect therein, although under some circumstances they may endanger the safety of the public; but they are not authorized to regulate the erection and maintenance of permanent structures or additions to a building, which stands in the way itself, or create an obstruction therein.

There are grave reasons why the legislature should not give cities

authority to permit door-steps and other structures connected with buildings to encroach and to obstruct travel upon a highway, which all the citizens of the Commonwealth have the right to use; thus leaving to the discretion of a municipal corporation to determine to what extent the highways within its limits may be permanently encroached upon and devoted to private uses. In the absence of express words, or the use of such words as by necessary implication include such a grant of power, we cannot presume it was intended to be conferred. These considerations also afford an answer to the argument that Charlestown had authority to pass this ordinance under the power conferred by its charter to make such by-laws as towns may establish.

The case of *Commonwealth v. Goodnow*, 117 Mass. 114, is relied on as an authority by the plaintiff. In 1799, an act was passed prohibiting any person from erecting and maintaining any bow window, which should project more than one foot from the front of his house into any street in the town of Boston; thereby by implication allowing a bow window to project not more than one foot. Stat. 1799, ch. 31; 2 Mass. Spec. Laws, 340. An ordinance was passed by the city of Boston under the authority conferred by Gen. Stats., ch. 19, § 13, prohibiting all persons under a penalty from constructing any window which should project into the street. A bow window is clearly a projection on the side of a building, and the city having authority to make rules and regulations on that subject, it was held that the ordinance was valid. If the city had passed no ordinance on that subject, the statute of 1799 would have remained in force; but having passed an ordinance relating to the projection of windows, the provision of the statute of 1799 was superseded.

But this has no application to the case at bar. The city of Charlestown had no authority to pass an ordinance regulating the erection and maintenance of door-steps in the highway; and the provisions in regard to door-steps in Charlestown, contained in the Stat. of 1824, ch. 16, § 3, were not superseded. That statute was therefore in force at the time of the alleged injury.

Exceptions sustained.

NOTE BY THE REPORTER.—The case of *Goldstraw v. Duckworth* in the Queen's Bench Division, March 29, 1880, 42 L. T. 440, is in point. A statute provided that "no projection of any kind shall be made in front of any building over or upon the pavement of any street," with exceptions for shop fronts, doorways, cornices, and pilasters, under certain conditions. The sections immediately preceding prohibited the discharge of water, steam and

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smoke upon the footways or into the street, and provided for covering openings in or into the footways. It was held that the words "over or" only included such projections as would be an obstruction to foot passengers, and did not include projections all the way up a house. On the hearing of the information it was proved that the projection complained of was an oriel window of stonework, which measured from the bottom to the top 11 ft., and projected over the foot-path 2 ft. 6 in., and that the distance between the lowest part of the window and the foot-path was 14 to 15 feet, and that such oriel window was not in the nature of a shop front, doorway, cornice or pilaster, and also that the land over which the window projected was to the extent of 2 ft. 6 in. part of the public highway, being, in fact, the foot pavement of the street. It was however proved to the magistrate that the window was not any nuisance or obstruction, except only so far as any such projection necessarily interferes with the access of light and air to the street, and with the regularity of the line of buildings in the street, and that it did not interfere with the free use of the foot-path. The court said: "It is contended that the words 'over or' upon the pavement apply to any projection in any building, however high. If that construction is right, it would prevent the owner of a private house from having a balcony, verandah, or other harmless projection, if it projected beyond the vertical line. We are persuaded, looking at the act, that this was not its intention. The object of the string of sections relating to footways was to keep them clear for foot passengers, and of the words 'over or' was to meet the case of a projection not actually touching the foot-path, but at the same time an obstruction to foot passengers. Therefore, the words referring to shop fronts, etc., are inserted to except them, under certain conditions, from this section. If the intention had been to prevent projections all the way up the house, we should not have expected to find the exceptions relating to facias. We are, therefore, of the opinion that the magistrate took the right view, and that these sections are not intended to preserve the free passage of air, but only the free passage of foot passengers."

COMMONWEALTH V. HALL.

(128 Mass. 410.)

Criminal law — game law — offering to sell birds killed in another State.

The statute punishing any one who in Massachusetts takes or kills woodcock, etc., between specified days, or buys, sells, offers for sale, or has them in possession within the same time, does not apply to such birds lawfully taken or killed in another State. (*See note, p. 389.*)

CONVICTION of unlawfully offering woodcock for sale. The opinion states the facts.

E. Avery, for defendants.

G. Marston, attorney-general, and *F. H. Gillett*, assistant attorney-general, for Commonwealth.

GRAY, C. J. This complaint is founded on the Stat. of 1879, ch. 209, § 1, by which it is enacted that "whoever in this Common-

wealth takes or kills any woodcock or any ruffed grouse, commonly called partridge, between the first day of January and the first day of September in any year, or any quail between the first day of January and the fifteenth day of October in any year, or within the respective times aforesaid sells, buys, has in possession, or offers for sale, any of said birds, shall upon conviction be punished by a fine of \$20 for each and every such bird."

The clause of this statute, as to having in one's possession within the times mentioned "any of said birds," neither, on the one hand, expressly includes, like the Stat. of 1855, ch. 197, § 1, and the Gen. Stats. ch. 82, § 1, "birds taken or killed in this Commonwealth or elsewhere;" nor on the other hand, is it in terms limited, like the Rev. Stats. ch. 53, § 1, and the Stats. of 1870, ch. 304, § 1, and 1877, ch. 95, § 1, to birds taken or killed within the Commonwealth.

The question presented by the case at bar is, whether, in the absence of any explicit manifestation of the intent of the legislature, the words "any of said birds" are to be construed in the larger sense, as meaning any woodcock, partridge or quail whatever; or in the more restricted sense, as meaning any woodcock, partridge or quail taken or killed in this Commonwealth within the times before mentioned. By the first alternative, the mere possession, in the first part of every year, of birds which had been lawfully taken or killed in another State, or even in this Commonwealth and at a time when it was lawful to kill them here, would be made a punishable offense; as if, for instance, woodcock killed in the autumn should be preserved in ice after the first of January for subsequent consumption. To adopt such a conclusion, when not imperatively required by the language of the act, would be inconsistent with the ordinary rules of construction of penal statutes.

Some stress was laid by the attorney-general on the proviso inserted at the end of § 1 of the Stat. of 1879, in these words: "Provided that any person may buy, sell, or have in possession, quail and pinnated grouse, commonly called prairie chicken, during the months of January, February, March and April, provided the same are not taken or killed contrary to the provisions of this act." This proviso, with no other change except in being limited to four months instead of extending throughout the year, is taken from the Stat. of 1877, ch. 95, in which it appears at the end of § 7, corresponding to § 9 of the Stat. of 1879, and imposing a penalty on

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"whoever in this Commonwealth at any season of the year takes or kills any pinnated grouse, commonly called prairie chicken, unless upon ground owned by him and grouse placed thereon by the owner." This proviso, relating both to quail and to pinnated grouse, has thus been transferred, from a section relating to pinnated grouse and not to quail, to a section relating to quail and not to pinnated grouse. That it is not necessarily inconsistent with a strict construction of the enacting clauses of the statute is shown by the very fact of its having been first introduced in the statute of 1877, which expressly limited the prohibition of having in possession woodcock, partridge or quail to those "taken or killed within this Commonwealth." Stat. 1877, ch. 95, § 1.

The true construction of the clause in question is put beyond doubt by section 10, which enacts that "in all prosecutions under the provisions of this act, the possession, except as provided in section one, by any person or corporation, of birds mentioned as protected by this act, during the time within which the taking or the killing of the same is prohibited, shall be *prima facie* evidence to convict under this act." That the words "except as provided in section one" refer to the proviso only, and not to the enacting clauses of that section, may be inferred from the exception's not mentioning the second, third and fourth sections, relating to ducks and teal, plover and sandpiper, doves and terns, which contain no such proviso, but are in all other respects like the first section: And saying that possession shall be *prima facie* evidence necessarily implies that it shall not be conclusive; if the mere possession of birds during the time within which the taking or killing of them is prohibited, of itself constituted an offense under the previous sections of the statute, to say that such possession shall be *prima facie* evidence would be superfluous, if not absurd.

The object of the statute is to protect these birds during the breeding season, and for such a reasonable portion of the year as may prevent them from being exterminated or their numbers diminished in this Commonwealth. The mode in which the statute seeks to attain this object is by punishing the taking or killing of such birds in this Commonwealth during the times specified, or the buying, selling, offering for sale or having in possession in this Commonwealth, during those times, of birds so taken or killed; and by enacting that the possession in this Commonwealth at such times of any birds of the kinds specified shall be *prima facie* evi-

dence to convict; leaving it for the defendant to prove, if he can, that the birds found in his possession were not taken or killed in this Commonwealth at a prohibited time. So construed, the statute is reasonably adapted to carry out its object, and is free from all constitutional difficulty. *Commonwealth v. Williams*, 6 Gray, 1, 6; *Phelps v. Racey*, 60 N. Y. 10; s. c., 19 Am. Rep. 140; *Railroad Co. v. Husen*, 95 U. S. 465.

In the case at bar, it being agreed that the woodcock which the defendants had in their possession, offered for sale and sold, had been lawfully taken or killed in another State, the defendants were wrongly convicted.

The cases mentioned at the argument are distinguishable from the present case. The statute of 39 and 40 Vict., ch. 29, § 2, under which it was held in *Whitehead v. Smithers*, 2 C. P. D. 553, that a person having in his possession a plover killed abroad might be convicted, differed from the statute before us in explicitly enacting that any one who should at certain seasons "kill, wound or take any wild fowl, or have in his control or possession any wild fowl recently killed, wounded or taken," should be subject to a penalty; and in omitting to re-enact the clause of a previous statute, which allowed a defendant to show that the bird had been bought or received before the prohibited time, or from some person residing out of the realm. And the statute of New York of 1871, ch. 721, under which the defendant was convicted in *Phelps v. Racey*, above cited, for having in his possession quail killed in another State, enacted that no person should kill or expose for sale, or have in his possession "after the same has been killed," any quail between the times mentioned, and defined the cases (of which that before the court was not one) in which the defendant might protect himself by proving that the bird had been killed before the prohibited time, or in a state in which the killing was not prohibited.

Exceptions sustained.

NOTE BY THE REPORTER. — In *Magner v. People*, Illinois Supreme Court, Feb. 1861, the contrary doctrine was held in respect to game unlawfully killed in the other State. The court said:

"But it is argued, this cannot be the correct construction, because such a prohibition does not tend to protect the game of this State. To this there seems to be two answers. First, the language is clear, and free of ambiguity, and in such case there is no room for construction. The language must be held to mean just what it says. Second. It cannot be said to be within judicial cognizance that such a prohibition does not tend to protect the game of this State. It being conceded, as it tacitly is by the argument, that permitting

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the intrapping, netting, insnaring, etc., of wild fowl, birds, etc., during certain seasons of the year, tends to the protection of wild fowl, birds, etc., we think it obvious that the prohibition of all possession and sales of such wild fowls or birds, during the prohibited seasons, would tend to their protection, in excluding the opportunity for the evasion of such law by clandestinely taking them beyond the State, and afterward bringing them into the State for sale, or by other subterfuges and evasions.

"It is quite true that the mere act of allowing a quail netted in Kansas to be sold here does not injure, or in anywise affect the game here — but a law which renders all sales and all possession unlawful, will more certainly prevent any possession or any sale of the game within the State, than will a law allowing possession and sales here of the game taken in other States. This is but one among many instances to be found in the law, where acts which in and of themselves alone, are harmless enough, but which are condemned because of the facility they otherwise offer for a cover or disguise for the doing of that which is harmful.

"A similar objection to the construction of the act, it seems, was raised in *Whitehead v. Sathers*, 8 C. P. D. 553; 31 Moak, 458, but Lord COLERIDGE, C. J., said: 'I am of opinion that that argument is not well founded. It is said it would be a strong thing for the legislature of the United Kingdom to interfere with the rights of foreigners to kill birds. But it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter, as well as of protecting other British interests, is by interfering indirectly with the proceedings of foreign persons. The object is to prevent British wild fowl from being improperly killed and sold under pretense of their being imported from abroad.'

"In that case the wild fowl was shown to have been one of a consignment of dead plovers received by a poulterer from Holland, and it was held that its sale was prohibited by general language like that of the section under consideration, prohibiting all sales of such fowls.

"In *Phelps v. Racey*, 60 N. Y. 10; s. c., 19 Am. Rep. 140, the language of the statute was substantially the same as that of the 6th section. The defense there was that the bird — a quail — had been killed in the proper season, but had been kept by a process for preserving game until after the season expired, and then offered for sale. The court said: 'The penalty is denounced against the selling or possession after that time, irrespective of the time or place of killing. The additional fact alleged that the defendant had invented a process of keeping game from one lawful period to another, is not provided for in the act, and is immaterial.'" Compare *State v. Saunders*, 19 Kan. 127; s. c., 37 Am. Rep. 98.

COMMONWEALTH V. HARTWELL.

(126 Mass. 415.)

Criminal law — homicide by negligence — indictment — proof.

On an indictment against a railway conductor for manslaughter, caused by his criminal negligence in misplacing a switch and omitting to notify it to an approaching train, and alleging that he knew the approach of the other train, the fact of his knowledge must be proved as laid.

CONVICTION of manslaughter. The opinion states the case.

D. S. Richardson and S. Hoar, for defendant.

G. Marston, attorney-general, and F. H. Gillett, assistant attorney-general, for Commonwealth.

ENDICOTT, J. This is an indictment for manslaughter, in which the defendant is charged with negligence and omission of duty, as conductor of a freight train, whereby another train was thrown from the track, and a passenger thereon was killed.

The indictment recites that the defendant was a conductor in the employment of the Old Colony Railroad Company, and was, on October 8, 1878, in charge of a freight train, on the road of the company, which had been run over the outward track from Boston to the Wollaston station in Quincy under his direction; that the company had established for the guidance of its servants proper and sufficient rules and regulations, having relation to the crossing of the inward track, over which trains passed on their way to Boston, by locomotive engines and trains using or running upon the outward track, which rules and regulations were in force at the time and well known to the defendant; and that it became and was his duty not to conduct his locomotive engine from the outward track across the inward track, without first sending forward the proper signal to warn the driver of any train approaching on the inward track that he could not safely pass without stopping.

The indictment then charges as follows: "Yet the said Hartwell, well knowing the premises, and well knowing that a certain train, to wit, a train consisting of a certain other locomotive steam-engine, and divers, to wit, twenty cars attached thereto and drawn thereby, was then and there lawfully travelling and being propelled on and along the said inward track of said railroad, and was then due and about to arrive at that part of said railroad in Quincy aforesaid, near the Wollaston station aforesaid, but disregarding his duty in that behalf did" at the same time and place "willfully and feloniously, and in a wanton, negligent and improper manner, and contrary to his duty in that behalf, and while the last-mentioned train was then and there due and about to arrive as aforesaid, conduct and drive, and suffer, permit and direct to be conducted and driven," his own locomotive engine across the inward track to a side track, and attached to it certain freight cars, and again crossed the inward track to the outward track, "thereby

leaving the switch thrown out of line, so as to disconnect the rails upon the inward track, without first sending forward any signal whatever to warn the driver of said approaching train so due as aforesaid," in accordance with the rules and regulations of the company.

The indictment, after again stating that this train of twenty cars was then due, and that the defendant neglected to send forward the required signal, proceeds to charge in substance, that by means of the premises and the felonious neglect and omission of the defendant, the driver of the approaching train, then due at the Wollaston station, was induced to believe that the inward track was unbroken and unobstructed, and that he might safely pass; that he did not stop, but continued on his course, and by reason of the misplacement of the switch, the train was thrown from the track, and a passenger therein named Patrick Reagan was killed.

It appeared in evidence that the train thus thrown from the track was an extra train, and that the defendant had a written notice from the superintendent of the company that it would run on that day. The notice contained the time-table of the train, and it was due in Boston soon after five o'clock in the afternoon. The defendant's train left Boston on its regular time, at half-past six, more than an hour after the extra train was due in Boston, and reached Wollaston station soon after seven. The extra train was then, according to the time-table contained in the notice received by the defendant, more than two hours behind time. The defendant while at the Wollaston station, in obedience to directions from the freight agent, took the freight cars from the side track, crossing the inward track, as set forth in the indictment, without sending forward the required signal to warn any train approaching on that track. No evidence was introduced by the government that the defendant knew that the extra train was then due and about to arrive at the Wollaston station. On the contrary, it appeared by the evidence that he then understood it was in Boston, and stated to his engineer before he left Boston that it had arrived.

Among other instructions requested, the defendant asked the court to rule, that the averment that Hartwell well knew that a certain train "was then and there lawfully travelling and being propelled on and along the said inward track of said railroad, and was then due and about to arrive at that part of said railroad in Quincy aforesaid near the Wollaston station aforesaid," was r

material averment, which must be proved by the Commonwealth, and there was no evidence in the case to support that averment.

The court declined to give this ruling ; and it is contended by the government that this averment need not be proved as laid, but can be rejected as surplusage. But we are of opinion that the ruling should have been given, and that the defendant's exceptions on this point must be sustained.

The precise question is whether this averment can be rejected as mere surplusage, or whether it is of such a character as not only to be descriptive of the negligence charged, but in its connection with the other parts of the indictment, is notice to the defendant of the exact charge which he has to meet.

The defendant is charged with the crime of manslaughter ; and the specific nature of the charge is, that by reason of his culpable negligence and omission to perform his duty, Patrick Reagan was killed. His guilt therefore depends solely upon the question whether he was negligent, and failed to perform his duty upon a given occasion, and under such circumstances that he may be held criminally responsible for the death. He is entitled, therefore, to have the nature, character and extent of the negligence, which connects him with the death of Reagan, fully and plainly, substantially and formally described to him in the indictment.

This the indictment does or attempts to do, and charges in substance, that well knowing the rules of the road, and his duty in that regard, and what signals should be given when an engine or train from the outward track crosses the inward track, and also well knowing that this particular train was then due and about to arrive upon that track, he neglected to give the required signal, and the death of Reagan was the result. The pleader has made the knowledge of the defendant that the express train was due, as well as his knowledge of the rules and his duty in regard to them, an essential and material portion of the description of the acts and conduct of the defendant which go to constitute the negligence charged ; and the negligence charged is not merely that he failed to give the signal required to notify any approaching train, but that he failed to give it when he knew there was an instant and pressing necessity for so doing, because this particular train was then due at that point.

This was not an impertinent averment, or foreign or inapplicable to the charge, because proof of such knowledge would establish the

most culpable negligence. The gist of the indictment is the defendant's negligence ; and in alleging it this specific act of negligence, to wit, a disregard of his duty to warn this train, which he knew then to be imminent, is made a part of the description of that which is essential to the charge. The general neglect of duty is resolved into this particular manner of neglecting it ; and having charged a general neglect, the indictment notifies the defendant that the neglect of his general duty was in this specific mode. While it is unnecessary to decide whether or not it would be sufficient in this case to allege in general terms a neglect of duty, in not sending out a signal to warn any approaching train, without alleging that the defendant knew that the inward track was liable at any time to be used by an approaching train ; it is clear, that when not merely general neglect of duty is alleged, but the particular in which it was violated is carefully and with precision set out, the defendant has the right to assume that the specific negligence thus alleged is the mode in which the general duty has been violated.

The government having selected the precise ground upon which to stand, in describing and expressing the nature and extent of the defendant's negligence, it must be confined to the limits which it has prescribed for itself. For it is well settled that an allegation must be proved, which is descriptive of the identity of the charge, or of that which is legally essential to the charge ; and when any allegation narrows and limits that which is essential, it is necessarily descriptive. *Commonwealth v. Wellington*, 7 Allen, 299, and cases cited ; *Com. v. Jeffries*, 7 id. 548 ; *Com. v. Hughes*, 5 id. 499 ; *Com. v. Gavin*, 121 Mass. 54 ; s. c., 23 Am. Rep. 255, and cases cited ; *United States v. Howard*, 3 Sumn. 12 ; *U. S. v. Porter*, 3 Day, 283 ; *Churchill v. Wilkins*, 1 T. R. 447 ; *Bristow v. Wright*, 2 Doug. 665 ; 1 Chit. Crim. Law, 294, 557 ; 1 Greenlf. Ev., § 65. The same principle has been recognized in those cases in this Commonwealth, in which it has been held that an averment might be treated as surplusage, when not descriptive of the identity of the charge, or of any thing essential to it. *Com. v. Pray*, 13 Pick. 359 ; *Com. v. Randall*, 4 Gray, 36 ; *Lyons v. Merrick*, 105 Mass. 71 ; *McNeil v. Collinson*, 128 id. 313.

It is undoubtedly true, that when an indictment alleges the commission of an offense by various means, it is sufficient to prove enough of the means to constitute the offense ; as in the familiar

case of obtaining money by false pretenses, proof of all the pretenses charged is not necessary ; it is sufficient if enough are proved to establish the charge. But when the indictment states a pretense in general terms and then specifies the particulars, it is the particular, and not the general, statement which must be proved ; as for example, if it alleges that a defendant, as a representation of his ability to pay, stated that he owned a large amount of stock in corporations, and then specifies a certain number of shares that he claimed to own in a particular stock, the allegation being thus qualified and limited, the proof must relate to that particular stock. In *Com. v. Jeffries, ubi supra*, the indictment charged that the defendant falsely pretended that he had an order from a certain person in New York, whose name he did not disclose, to purchase goods ; the proof was that he falsely pretended that he had an order to purchase them, without stating that it came from a person in New York ; and it was held that the variance was fatal, and there was no evidence to support the charge. See *Rex v. Ples-tow*, 1 Camp. 494. And when a person is charged with stealing a white horse, the specific averment of color is not necessary, but being descriptive of that which is material, it cannot be rejected as surplusage, but must be proved as laid. 3 Stark. Ev. (1st ed.) 1531. See, also, *State v. Noble*, 15 Me. 476; *Com. v. Gavin*, 121 Mass. 54; s. c., 23 Am. Rep. 255.

In the case at bar, the negligence of the defendant is essential to support the charge of manslaughter. The specific averment that he knew that this particular train was then due bears directly upon that question ; and being set out in that part of the indictment which charges the negligence, it is descriptive of the facts and circumstances which surrounded the defendant at the time, in view of which he acted or failed to act, and of the kind and character of the negligence of which he is alleged to have been guilty. There being no evidence to support it, the conviction cannot be sustained.

In this view of the case, it becomes unnecessary to consider the other questions fully and ably argued at the bar.

Exceptions sustained.

CONNELL V. REED.

(128 Mass. 477.)

Trade-mark—deceptive title—infringement.

If there is any right of trade-mark in the words "East Indian" in connection with "remedy," on bottles of medicine, the false adoption of those words to indicate that the medicine is used in the East Indies will defeat an action for infringement.

ACTION to restrain infringement of trade-mark. The opinion states the case. The defendant had judgment below.

J. L. S. Roberts, for plaintiffs.

C. Robinson, Jr., & G. A. Blaney, for defendants, were not called upon.

GRAY, C. J. This is a bill in equity to restrain the defendants from infringing upon an exclusive right claimed by the plaintiffs in the words "East Indian," used together with the word "remedy" or "remedies," as a trade-mark upon bottles of medicine.

Although the master reports that there was no evidence that any other person than the plaintiffs or their agents had ever used these words in connection with the manufacture and sale of medicines, it is at least doubtful whether words in common use as designating a vast region of country and its products can be appropriated by any one as his exclusive trade-mark, separately from his own or some other name in which he has a peculiar right. *Canal Co. v. Clark*, 13 Wall. 311; *Taylor v. Carpenter*, 3 Story, 458, and 2 Sandf. Ch. 603; *Gilman v. Hunnewell*, 122 Mass. 139, 148.

But the conclusive answer to this suit is that the master has found, upon evidence which appears to us to be satisfactory, that the plaintiffs have adopted and used these words to denote, and to indicate to the public, that the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which is the fact. Under these circumstances, to maintain this bill would be to lend the aid of the court to a scheme to defraud the public. *Pidding v. How*, 8 Sim. 477; *Perry v. Truesitt*, 6 Beav.

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66, 76; *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G., J & S. 137, and 11 H. L. Cas. 523, 532, 542, 548; *Palmer v. Harris*, 60 Penn. St. 156. The decree dismissing the bill must therefore be affirmed, with costs.

Affirmed, with costs.

KELLY V. JOHNSON.

(128 Mass. 530.)

Master and servant — when relation not created.

Where a servant engaged in a temporary work for another, on the false representation that the master had directed it, he does not become the servant of that other so as to be remediless for an injury by the negligence of the latter's servant.

ACTION for injuries by negligence of defendant's servant. The opinion states the facts. The plaintiff had judgment below.

J. F. Pickering (*J. W. Pickering* with him), for defendant.

W. Gaston and *C. L. B. Whitney*, for plaintiff.

MORTON, J. The verdict of the jury settles the fact that the plaintiff was injured by the negligence of a servant of the defendant in the course of his employment.

At the trial the defendant contended that he was not responsible for the injury, because the plaintiff was a fellow-servant of the person by whose negligence he was injured. Upon this point the following facts appeared and were established by the verdict. The plaintiff was a machinist in the employ of one Winchester, a builder of steam engines and machinery. The defendant, a teamster, was employed to transport an engine from Winchester's shop to the railroad station. He went with his team and servants to do this work. After the engine was loaded upon the truck he falsely represented to the plaintiff that Winchester had agreed to send two of his men to the station to assist in loading the engine upon the car. The plaintiff was thereby induced to go to the station to assist the defendant, and while putting the engine upon the car was injured.

 Davis v. Somerville.

The presiding justice rightly instructed the jury that upon these facts the plaintiff did not become the servant of the defendant. A servant cannot recover of his master for an injury caused by the negligence of a fellow-servant, because when he enters into the service he by implication agrees that he will take the ordinary risks of the service, including the risk of the negligence of fellow-servants. But the plaintiff did not enter into the service of the defendant. There was no contract of service between them. The plaintiff could not recover any wages of the defendant. He was in the service of Winchester, and believed and understood that he was doing the work of Winchester. He was induced to assist the defendant by his false representations, but the defendant cannot thus impose upon him the incidental and implied obligations of a contract of service into which he has not entered.

Judgment on the verdict.

 DAVIS v. SOMERVILLE.

(128 Mass. 504.)

Sunday — travel on — what is.

One who is injured by a defect in a highway, on his return from a funeral, on Sunday, having diverged from his ordinary route to make a social call, is remediless.*

ACTION for injury sustained by reason of defect in highway. The injury occurred on Sunday. The plaintiff had driven, to attend a funeral, from Boston to Cambridge, and after the funeral was driving back by way of Charlestown to call on his sister-in-law when the injury happened. The judge instructed the jury as follows: "It must appear that the plaintiff was travelling lawfully at the time when the accident occurred. The plaintiff could lawfully travel for the purpose of going to or returning from a funeral on the Lord's day; and if, in fact, he was returning from a funeral, though by a different route, he was not travelling unlawfully, unless the route taken by him was so unreasonable and inconvenient as to show that his purpose was not to return, but to do

* See *White v. Lang*, post, p. 428.

something else not a work of necessity or charity. The fact that the plaintiff took a route back from Mount Auburn different from that by which he went, and that he took that route for the purpose of enabling the lady with him to make a call upon her sister-in-law, are facts to be considered by the jury, bearing upon the question whether he was travelling for any other purpose than that of going to and returning from the funeral, or for the purpose of doing any thing not a work of charity or necessity. But these facts are not conclusive evidence, so that the court can say to the jury, that as matter of law, they ought to return a verdict for the defendant, on the ground that the plaintiff was travelling in violation of law, but only evidence proper to be submitted to the jury as bearing on the question to be determined by them, whether the plaintiff was at the time of the alleged injury travelling in violation of law." The plaintiff had judgment.

S. C. Darling, for defendant.

N. B. Bryant, for plaintiff.

AMES, J. The statute making it unlawful and criminal to travel on the Lord's day, except from necessity or charity, has retained its place in our statute book from the earliest times in the history of the State. Our Puritan ancestors intended that the day should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements. They saw fit to enforce the observance of the day by penal legislation, and the statute regulations which they devised for that purpose have continued in force, without any substantial modification, to the present time. Whatever inconveniences might result at the present day from the literal and general enforcement of the Lord's day act, and whatever hard cases may have arisen under it, it is still the law of the land, to be judicially interpreted and administered according to its true intent and meaning, and upon the same rules as would govern us in the interpretation of any other statute.

If the plaintiff in this case was travelling, on the Lord's day, without the excuse of necessity or charity, he cannot maintain an action against any town or city for any injury or damage sustained through a defect or want of repair upon a highway, for the reason

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that his own unlawful act concurs in causing such injury or damage. *Bosworth v. Swansey*, 10 Metc. 363; *Jones v. Andover*, 10 Allen, 18; *Stanton v. Metropolitan Railroad*, 14 id. 485. We do not understand that any complaint was made as to the definition of the terms "necessity" and "charity" as given by the presiding judge. The necessity intended by the statute is not to be limited, on the one hand, to absolute physical necessity, nor on the other hand, is it to be so enlarged as to include mere business convenience or advantage. *Smith v. Boston & Maine Railroad*, 120 Mass. 490; s. c., 21 Am. Rep. 538. It is not easy to give a precise and strict definition which shall determine as a matter of law what facts constitute the necessity or charity intended by the statute. It was correctly ruled at the trial that the plaintiff could lawfully travel on the Lord's day for the purpose of going to or returning from the funeral, and also that it was not necessary that he should return by the same or by the shortest route, unless the route taken by him was so unreasonable and inconvenient as to show a purpose outside of the alleged necessity or charity. But if while in attendance at the funeral or upon leaving the cemetery it was proposed to him by his companion to go to another place, not upon the ordinary return route, in order for her convenience or pleasure to visit a friend, and if he acceded to this proposal, it would be the substitution of a new and different purpose of the journey in place of that which he had in view when he began it, and a purpose entirely outside of the necessity or charity which influenced him at the outset. If he had taken her from her residence and gone with her to Charlestown to make the intended visit on the Lord's day, without attending the funeral at all, it would have been a clear violation of the statute. It is difficult to see why it would be any the less so if, having attended the funeral, he instead of returning directly from it accepts an invitation to make a different journey for a purpose having nothing whatever to do with the funeral. This would be perfectly obvious if the change of purpose were in order to go to some remote place beyond the cemetery, thereby occupying a greatly increased time, or if the additional journey were for the transaction of business manifestly secular in its nature. He had a right to travel to attend the funeral. But the journey to Charlestown for no other purpose than to enable his companion to make a social call was not within the exception of the statute. It makes no difference that the determination to make that journey was formed after he had

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attended the funeral and was about to return. By the terms of the statute he had no right to make that journey at all on that day and for that purpose.

The majority of the court is therefore of the opinion that the presiding judge fell into the error of submitting to the jury what was really a question of law, and that he should have instructed them that upon the undisputed facts of the case the plaintiff had not brought himself within the exception expressed in the statute, and was not entitled to maintain the action.

Exceptions sustained.

 WHITE V. LANG.

(128 Mass. 508.)

Sunday — injury by assault of dog while travelling.

One whose property is injured by the assault of a dog is not defeated in his action of damages against the owner by the fact that the plaintiff was unlawfully travelling on Sunday at the time.*

ACTION for injury to a buggy. The plaintiff was driving on Sunday, when the defendant's dog jumped at his horse's head and frightened the horse so that he ran away and overturned and injured the buggy. The plaintiff had judgment below.

H. E. Ware, for defendant.

E. T. Buss, for plaintiff.

MORTON, J. We must assume for the purposes of this case that the plaintiff was unlawfully travelling on the Lord's day. But this fact does not defeat his right to recover unless his unlawful act was a contributory cause of the injury he sustained. *McGrath v. Merwin*, 112 Mass. 467; s. c., 17 Am. Rep. 119; *Marble v. Ross*, 124 Mass. 44, and cases cited. It has been held in this Commonwealth that if a person who is unlawfully travelling on the Lord's day is injured by a defect in the highway, or by a collision with

* See *Davis v. Somerville*, ante, p. 390; *Davidson v. City of Portland* (69 Me. 116), 31 Am. Rep. 253.

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the vehicle of another traveller, he cannot recover for the injury. This is upon the ground that his illegal act aids in producing the injury, or in other words, is a contributory cause. *Lyons v. Desotelle*, 124 Mass. 387; *Connolly v. Boston*, 117 id. 64; s. c., 19 Am. Rep. 396.

On the other hand, it has been held in several cases that if a person who is at the time acting in violation of law receives an injury caused by the wrongful or negligent act of another, he may recover therefor if his own illegal act was merely a condition and not a contributory cause of the injury. *Marble v. Ross*, *ubi supra*; *Steele v. Burkhardt*, 104 Mass. 59; *Kearns v. Sowden*, id. 63, note; *Spofford v. Harlow*, 3 Allen, 176.

We are of opinion that the case at bar falls within the last-named class. If a man while travelling is injured by an assault, the act of travelling cannot in any just sense be said to be a cause of the injury. It is true that if he were not travelling he would not have received the injury, but the act of travelling is a condition and not a contributory cause of the injury. The plaintiff when travelling was assaulted and injured by a dog, for whose acts the defendant is responsible. Gen. Stats., ch. 88, § 59; *LeForest v. Tolman*, 117 Mass. 109; s. c., 19 Am. Rep. 400; *Sherman v. Favour*, 1 Allen, 191. The act of travelling had no tendency to produce the assault or the consequent injury, and therefore, though the plaintiff was travelling in violation of law, it does not defeat his right of recovery.

Exceptions overruled.

NOTE BY THE REPORTER.—The following cases have in this volume been sufficiently reported in notes, as follows:

Larabee v. Peabody, p. 561.—A town is not liable to a person who is injured by falling into a trench near a town building, but outside the highway, on the occasion of attending an entertainment given in the building by a society, which has received the free use of the building for such entertainment. See note to *Hollenbeck v. Winnebago Co.*, *ante*, 159.

Clark v. Wallham, p. 567.—A town is not liable for an injury received by a traveller by reason of a defect in a public common, although the town has constructed public foot-paths across it, the place where the injury occurred not being connected with any building for the use of which the town received any pecuniary benefit. See note to *Hollenbeck v. Winnebago Co.*, *ante*, 159.

Steele v. Briston, p. 563.—A city is not liable for an injury caused to a person on a public common by collision with a coasting sled, on a path therein, although the city has not only permitted the coasting, but specially fitted the path for the purpose, by bridging and freezing it. See note to *Schultz v. Milwaukee*, *post*.

CASES

IN THE

SUPREME COURT

OF

MISSOURI.

MCCLURE V. HERRING.

(70 Mo. 12.)

Deed—execution by attorney—what sufficient.

A deed was drawn as follows: "I, H., for myself, and as attorney for T. and T., by their letters of attorney under their hands and seals, in consideration of \$—, to us paid by L., do sell and convey to L. * * * And we, the said T. and T., do covenant with said L. * * * In witness whereof I, H., in my own right, have hereunto set my hand and seal, and as attorney for said T. and T., have hereunto set their hands and seals." The names of H. and of T. and T. by H., their attorney in fact, were subscribed, with seals severally affixed to all the names. *Held*, well executed.

EJECTMENT. The opinion states the facts. The defendant had judgment below.

S. P. Huston, for appellant.

F. H. Ramer and *T. D. Neal*, for respondent. 1. It was the deed of the attorney and not that of the principal. The granting part of the deed is clearly that of the attorney, and although it

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makes the principal covenant expressly in the conclusion of the deed, yet he does not covenant by the words "grant, bargain and sell," and the granting clause is the controlling part of a deed. 2 Wash. on Real Prop. (2d ed.), 651, 652, 613; Shep. Touch. 52, p. 98. The grant must be that of the principal. 2 Wash. on Real Prop. (2d ed.), 598, 599, p. 573; *Murphy v. Price*, 48 Mo. 247; *Elwell v. Shaw*, 1 Am. Lead. Cas. (4th ed.) 596; *New England Marine Ins. Co. v. De Wolf*, id. 600, 607. The deed does not purport to be that of the principal, but that of the attorney only. It is by Thomas W. Hawkins, who as "attorney for Leo and Mrs. G. Augusta Tarlton, sets their hands and seals." 1 Am. Lead Cas. 602, 603.

HENRY, J. The plaintiff brought suit in the Harrison Circuit Court to its March term, 1877, against defendant for the possession of the south-west quarter of section 20, township 66, range 27, in said county. The petition was in the ordinary form of petition in ejectment. The defendant's answer was a general denial. Plaintiff read in evidence, to maintain the issues on his part, a United States patent, conveying the land to Leo Tarlton. Plaintiff then read in evidence a power of attorney from Leo Tarlton and wife to Thomas W. Hawkins, authorizing him as their attorney in fact, in their names, to sell and dispose of, in fee simple, all lands of which they were seized in the counties of Atchison, Andrew, Harrison, Grundy and Gentry, in the State of Missouri; as well as other lands situate and lying in the State of Missouri; and for them, in their names and as their act and deed, to sign, seal, execute and deliver such deeds and conveyances for the sale and disposal of any part thereof, as their said attorney should think fit. Plaintiff next offered in evidence a certified copy of the record of a deed from Thomas W. Hawkins, for himself and Leo Tarlton and wife, to Alfred W. Lamb, which deed was as follows, affecting said lands, to-wit: "Know all men by these presents—That I, Thomas W. Hawkins, of Marion county, State of Missouri, for myself, and as attorney for Leo Tarlton and Mrs. G. Augusta Tarlton, his wife * * * by their duly authorized letters of attorney, under their hands and seals, in consideration of \$1,850, to us paid by Alfred W. Lamb, of Marion county, State of Missouri, do sell and convey to said Alfred W. Lamb, and his heirs forever, the following described tracts or parcels of land lying and situate in the county of Harrison, and

State of Missouri, to-wit: The * * * south-west quarter of section 20, township 66, range 27. * * * To have and to hold the said tracts or parcels of lands, with all the privileges, etc., to said grantee and his heirs forever. And we, the said Leo Tarlton and G. Augusta Tarlton, do covenant with said grantee and his heirs that we are rightfully seized in fee simple of said tracts or parcels of land, etc., and that we and our heirs will warrant the said premises to said grantee and his heirs forever against the lawful claims of all persons. In witness whereof, I, Thomas W. Hawkins, in my own right, have hereunto set my hand and seal, and as attorney for said Leo Tarlton and Mrs. G. Augusta Tarlton, have hereunto set their hands and seals.

“THOMAS W. HAWKINS, [L. s.]

“LEO TARLTON, [L. s.]

“G. AUGUSTA TARLTON, [L. s.]

“By Thomas W. Hawkins, their attorney in fact.”

Defendant, by his attorneys, objected to the introduction of said deed, because, 1st. It was the deed of the attorney, Hawkins, and not that of Tarlton and wife; 2d. It is ineffectual as a conveyance by Tarlton and wife, of any title owned by them in the land in controversy; 3d. The power of attorney under which the deed was made did not sufficiently designate the land to be conveyed by the attorney; 4th. The deed does not purport to be that of the principal, nor to convey the title of the principal, but only that of the attorney. The court sustained the defendant's objections, and rejected the deed as evidence, to which plaintiff excepted, and leave to set aside nonsuit taken being refused, plaintiff brings this case here by appeal.

Mr. Washburn, in his work on real property (vol. 2, 2d ed., 576), reviews the cases on the subject presented for consideration here by the action of the court in excluding the deed from the jury, and admits that there is conflict of opinion, but states the doctrine deducible from them thus: “The leading doctrine running through them, though not always applied, seems to be, that to make such a deed valid, the instrument itself must, in terms show that it is the deed of the principal, that he makes the grants and covenants, and that the seal is his. The instrument, in some part, must also show that its execution by the principal was done by the attorney named. If this all appears clearly in any part of the instrument, the precise

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form or arrangement of the words does not seem to be essential." In *Elwell v. Shaw*, 16 Mass. 42, 47, reported also in Am. Lead. Cas. as a leading case on the subject, the deed recited the power of attorney to Joshua Elwell, and then proceeded as follows: "Know ye that I, the said Joshua, by virtue of the power aforesaid, etc., do hereby bargain, grant, sell and convey, etc.," and concluded: "In testimony whereof, I have hereunto set the name and seal of said Jonathan this, etc. JOSHUA ELWELL. [Seal.]" The body of the deed there is similar in some respects to the deed in this case, but in the execution of the deed there is a marked and important difference. Here the names of the principals are signed as grantors and their seals attached, while neither in the body nor in the execution of the deed in *Elwell v. Shaw* does the principal appear as grantor. In *Mussey v. Scott*, 7 Cush. 216, METCALF, J., observes: "But however clearly the body of the deed may show an intent that it shall be the act of the principal, yet unless it is executed by his attorney for him, it is not his deed, but the deed of the attorney or no one." On that principle alone *Elwell v. Shaw* may be maintained, and there are numerous other adjudged cases which were controlled by that principle. *Fowler v. Shearer*, 7 Mass. 15, is frequently cited in discussion on this subject. There John Fowler, the husband, gave his wife, Abigail, a power of attorney to execute a deed for land — she made a conveyance as follows: "Know ye that I, Abigail Fowler, of Palmer, etc., and also as attorney to John Fowler, etc., in consideration of, etc., paid by Daniel Shearer, of Palmer, have given, granted, and by these presents do give, grant, etc." The language of the remainder of the deed purported to be her conveyance and her covenants. The instrument concluded "In witness whereof, I have hereunto set my hand and seal, this 7th day of August, 1805. ABIGAIL FOWLER. [Seal.]" The court held that it was not the deed of the husband. As in *Elwell v. Shaw*, the principal did not execute it, and therein both differ from the case at bar.

Harper v. Hampton, 1 Harr. & J. 709, was a case in which the attorney signed his own name as attorney for his principal, and it was held to be the deed of the attorney, and not of the principal. The contrary, however, was held by this court in *Martin v. Almond*, 25 Mo. 313, and while the adjudications on the subject are not harmonious, we think the doctrine of that case fully sustained by the weight of authority. There is a general disposition to relax the rigid rules

of the common law in regard to conveyances. The formality and exactness formerly deemed necessary are not now required. There is a disposition to effectuate the intention of the parties, where that can certainly be ascertained from the deed. But to return to the main question. *Shanks v. Lancaster*, 5 Gratt. 110, 118, is a case directly in point. "The deed made by the attorney was in the name of Abraham Beckner, attorney in fact for Jacob Beckner and Catherine, his wife, of the first part." It proceeded in the same style to convey the land, and in the same style he covenanted for himself, his heirs and executors, in behalf of said Jacob Beckner and Catherine, his wife, under authority of a power of attorney duly executed, and of record, to warrant the title to the plaintiff free from the claims of himself and his heirs, and from the claims of Jacob Beckner and wife, and their heirs, and it concluded: "In witness whereof, the said Abraham Beckner attorney in fact for Jacob Beckner and Catherine, his wife, as, aforesaid, has hereunto set his hand and seal, etc. JACOB BECKNER [Seal] and CATHERINE, his wife [Seal], by ABRAHAM BECKNER [Seal], their attorney in fact." The court held the deed sufficient to pass the title of Jacob Beckner to the grantee.

In *Hale v. Woods*, 10 N. H. 470, Daniel and Zachariah King were joint owners of a tract of land, and Daniel was empowered by Zachariah to sell and convey his interest. He sold the land and made the following conveyance: "I, Daniel King, as well for myself, as attorney for Zachariah King, doth for myself and said Zachariah, remise, release and forever quit-claim the premises (describing them) together with all the estate, etc., of us, the said Daniel and said Zachariah, which we now have, etc. And we, the said Daniel and Zachariah, do hereby, for ourselves, our heirs and executors, covenant that the premises are free from all incumbrances, and that the grantee may quietly enjoy the same without any claim or hindrance from us, or any one claiming under us, or either of us. In witness whereof, we, the said Daniel, for himself, and as attorney aforesaid, have hereunto set our hands and seal, etc. (Signed), DANIEL KING, and also DANIEL KING, attorney for Zachariah King, being duly authorized as appears of record," with seals affixed to each signature.

The court held the power properly executed, and that the deed passed the title of Zachariah. UPHAM, J., said: "The covenants in this case in the deed are clearly the covenants of the principal;

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and we think, from the terms used, the grant purports to be the act of the principal. The grant is for said Daniel and Zachariah of all the interest which we now have, or have heretofore had in the premises. If these terms, together with the covenants, purport a conveyance of the interest of the principal, the execution of the deed would seem to be sufficient to effect the intent of the instrument."

Those cases are not distinguishable in principle from the case at bar, and the facts in each were such as to raise the precise question presented by this record. See, also, *Butterfield v. Beall*, 3 Ind. 203; *Varnum v. Evans*, 2 McMullan, 409. In *Townsend v. Hubbard*, 4 Hill, 351, 359, WALWORTH, Ch., said: "To bind the principal by deed, no particular form of words is necessary, provided it appears upon the face of the instrument that it was intended to be executed as the deed of the principal, and that the seal affixed to the instrument is his seal, and not the seal of the attorney or agent merely."

In *Hunter's Admr. v. Miller's Exrs.*, 5 B. Mour. 612, 620, the court laid down the following, which Messrs. Hare and Wallace in their note to *Elwell v. Shaw*, say is a reasonable rule: "If it clearly appears, on the face of the instrument, who is intended to be bound, and if the mode of execution be such as that he may be bound, the necessary consequence of the universal principle applicable to contracts is that he is bound, and that if such appears to be the intention of the parties he alone is bound." Here, in the body of the deed, Hawkins declares that he makes the conveyance as attorney for Leo and G. Augusta Tarlton, under their power of attorney, and said Tarlton and wife, in the body of the deed, covenant with Lamb, the grantee, that they are rightfully seized in fee simple of the lands, and that they and their heirs will warrant the premises to said grantee and his heirs forever, etc. The consideration, \$1,850, is acknowledged in the deed to have been paid to "us," not to the attorney alone. The names of the principals were severally signed to the deed, with a seal to each. "By Thomas W. Hawkins, their attorney in fact." The manner in which the deed was executed, the covenant entered into by Tarlton and wife that they would warrant the title to Lamb, etc., the declaration in the deed that Hawkins is acting for the principals, naming them, by virtue of their power of attorney; the acknowledgment of the receipt of the money by "us," unmistakably show that it was the

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deed of the principals; and as this all appears clearly in the instrument, "the precise form or arrangement of the words does not seem to be essential." A review or even brief notice of all the adjudications on this subject, besides requiring immense labor, would only serve to show the conflict of the authorities, and the very nice distinctions occasionally drawn either to uphold or defeat a conveyance, but we are of opinion that a large majority of the courts in which the most rigid rules on the subject are maintained would sustain this deed. The court erred in excluding it from the jury as evidence of title in Lamb.

[Omitting a minor point.]

All concurring, the judgment is reversed and the case remanded.

Reversed and remanded.

ADKINS V. COLUMBIA LIFE INSURANCE COMPANY.

(70 Mo. 27.)

Insurance, life — suicide — sane or insane.

A policy of life insurance provided that in case of the death of the insured "by his own act or intention, whether sane or insane," the company should only be liable for the net value of the policy at that time. *Held*, that this provision embraced an intentional self-destruction by an insane man, provided he was conscious at the time of the physical nature and consequences of his act, and intended to destroy his life, although he was not conscious of the moral quality or consequences of the act.*

ACTION on a policy of life insurance. The opinion states the case. The plaintiff had judgment below.

Waldo P. Johnson, for appellant.

F. E. Savage and *W. L. Stewart*, for respondent.

HOUGH, J. This was an action on a policy of insurance issued to the plaintiff on the life of her husband, Henry G. Adkins. It appears from the agreed statement on which this cause has been

*See *Com. Mut. L. Ins. Co. v. Groom* (36 Penn. St. 22), 27 Am. Rep. 608, and references

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submitted that said Adkins committed suicide; "that at the time he committed suicide he was insane; that his mind was so far impaired that he did not understand the moral character, the general nature and consequences of the act, and that the act of self-destruction was the result of his insane condition of mind." The policy sued on contains the following clause and exception, to wit: "Provided, always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions: That in case of the death of said insured by his own act and intention, whether sane or insane, or by the use of intoxicating drinks, opiates or narcotics, it is expressly stipulated and agreed by all parties in interest that the company shall not be liable for the sum insured by said policy, but the company will pay, and the parties in interest will accept, in full discharge and satisfaction of said policy a sum equal to the net value of this policy at the time of the death of said insured, computed on the American Table of Mortality, with interest at six per cent." The defendant admitted it was liable for the net value of the policy at the time of the death of the insured, and tendered the same in court with costs, which was refused. The plaintiff recovered judgment for the full amount of the policy, and the defendant has appealed.

The rights of the parties depend upon the meaning to be attached to the words "in case of the death of said insured by his own act and intention, whether sane or insane," contained in the clause of the policy above quoted.

In the leading case of *Borradaile v. Hunter*, 5 Man. & Gr. 639, the words avoiding the policy were, "in case the assured shall die by his own hands." The court declared these words to be equivalent to the words "shall die by his own act," and held that as the assured had intentionally destroyed himself, though he was at the time incapable of distinguishing between right and wrong, the policy was void. It appeared from the evidence in that case that Mr. Borradaile threw himself from the parapet of Vauxhall bridge into the river Thames and was drowned. ERSKINE, J., said the words of avoidance "were large enough to include all intentional acts of self-destruction whether criminal or not, if the deceased was laboring under no delusion as to the physical consequences of the act he was committing; if he knew that it was water into which he was about to throw himself, and that the consequence of his leaping

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from the bridge would be his death, and if he voluntarily threw himself from the bridge into the river, intending by so doing to drown himself, the question whether he had thereby been guilty of a crime as *felo de se*, or whether, if he had at that time destroyed the life of another instead of his own, he was in a state of mind to be morally and legally responsible for his acts, was irrelevant to the question before the jury; that the state of mind of the assured was only material for the purpose of ascertaining whether the act of self-destruction was a voluntary and willful act for the purpose of destroying his life."

This decision was afterward followed in *Clift v. Schwabe*, 3 Man., Gr. & Scott, 438, and in *Dufaur v. Professional Life Ins. Co.*, 25 Beav. 599. The rule thus established in England has been adopted in this country in the following cases: *Dean v. Mutual Life Ins. Co.*, 4 Allen, 96; *Cooper v. Mass. Mut. Life Ins. Co.*, 102 Mass. 227; s. c., 3 Am. Rep. 451; *Nimick v. Mut. Benefit Life Ins. Co.*, 1 Big. Ins. Cas. 689; *Gray v. Union Mut. Life Ins. Co.*, 2 id. 4, and *Van Zandt v. Mut. Benefit Life Ins. Co.*, 55 N. Y. 169; s. c., 14 Am. Rep. 215. The case of *American Life Ins. Co. v. Isetts, Admr.*, 74 Penn. St. 176, virtually supports the rule, but the case of *Hartman v. Keystone Ins. Co.*, 21 id. 466, merely decides that if the insured committed suicide by swallowing poison, he died by his own hand. The rule is denied in *Eastabrook v. Union Ins. Co.*, 54 Me. 224, and in *Life Ins. Co. v. Terry*, 15 Wall. 580. The case of *Breasted v. Farmers' Loan & Trust Co.*, 4 Seld. 299, has been cited by Justice HUNT in *Life Ins. Co. v. Terry*, as being in opposition to the rule laid down in *Borradaile v. Hunter*, but it has been satisfactorily shown by the Court of Appeals of New York, in *Van Zandt v. M. B. Life Ins. Co.*, that there is no real conflict between those cases.

In the case of *Life Ins. Co. v. Terry*, the words of avoidance were, "shall die by his own hand," and the court held that these words referred to an act of criminal self-destruction only, and not to the voluntary death of one who did not realize or understand the moral quality of his act. The court said: "If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist,

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such death is not within the contemplation of the parties to the contract, and the insurer is liable."

The words, "by his own act and intention," used in the policy before us, are equivalent to the words, "by his own hand," and as to the meaning to be given these words, when standing by themselves, there is, as an examination of the cases cited will show, an irreconcilable conflict of opinion; those on one side maintaining that the policy would be avoided if the assured, at the time of causing his own death, was conscious of the physical nature and consequences of his act, and intended thereby to put an end to his own life, and those on the other side maintaining that the policy would not be avoided unless the insured were also conscious of the moral quality or criminality of such act. The policy before us, however, goes farther than any of those considered in the foregoing cases, and provides that it shall be void if the assured shall die "by his own act and intention, sane or insane;" and if it be permissible for life insurance companies to insert such a stipulation in their policies, it is manifest that the only question which can arise thereon, in the event of the suicide of the insured, is whether the act of self-destruction was intentional, or, in the words of *ERSKINE, J.*, whether it was "the voluntary and willful act of a man having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act; and the question whether he was, at the time, capable of understanding and appreciating the moral nature and quality of his purpose, is not relevant to the inquiry, further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself."

The words, "by his own act and intention," are, as has already been said, equivalent to the words of avoidance construed by the Supreme Court of the United States in the case of *Life Ins. Co. v. Terry*, and the addition thereto of the words "sane or insane," in the policy before us, conclusively shows that it was the purpose of the defendant in this case to avoid the risk of intentional self-destruction by an insane man; and we are of the opinion that the addition of these words is adequate to the accomplishment of that purpose. It has been expressly so decided by the Supreme Court of the United States in a very lucid opinion by Mr. Justice DAVIS in the case of *Bigelow v. Berkshire Life Ins. Co.*, 3 Otto, 284; s. c.,

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19 Am. Rep. 628. To the same effect, also, are *Pierce v. Travellers Life Ins. Co.*, 34 Wis. 389, and *Chapman v. Republic Life Ins. Co.*, 5 Big. L. & A. Cas. 110. The Commission of Appeals of New York, in the case of *De Gogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 232, go farther than the Supreme Court of the United States in the *Bigelow* case, and hold that a policy which provides that the insurer shall not be liable if the assured "shall die by his own hand or act, sane or insane," is avoided, "if death ensues from any physical movement of the hand or body of the assured proceeding from a partial or total eclipse of the mind."

The rule laid down by the Supreme Court of the United States in the *Bigelow* case, is the rule which we think is properly applicable to the policy now under consideration. While the words, "his own act and intention" have been construed to mean no more than the words "his own act," on the ground that the word "act" necessarily implies intention (*Chapman v. Republic Life Ins. Co.*); yet the addition of the word "intention" shows that the parties were solicitous to avoid all questions as to whether the policy was to be avoided by the physical act simply of the assured when unaccompanied by any corresponding intellectual purpose or act of the mind.

Nor do we see any reason why a life insurance company may not stipulate against voluntary and intentional self-destruction. The courts have repeatedly recognized their right to stipulate against numerous kindred risks, and we see no difference in principle between stipulating against a voluntary death by poison or by violence, and a voluntary death by opium or habitual drunkenness. In either case the avoidance of the policy proceeds upon the theory that it was within the power of the assured to avoid death by such instrumentalities, and therefore his duty to do so.

There is some difficulty, however, in applying to the admitted facts of this case, the construction which we have given to the language of the policy here sued on, in consequence of a want of perspicuity in the language of Mr. Justice HUNT in *Terry v. Life Ins. Co.*, heretofore quoted, a portion of which has been adopted by the parties to this suit as descriptive of the state of mind of the insured at the time of his death. We think with RAPALLO, J. (*Van Zandt v. Mutual Ben. Life Ins. Co.*, *supra*), that this passage literally construed includes several conditions which cannot coexist. We copy his comment: "It can be conceived that the act might have been

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voluntary and the self-destruction intentional, though the assured failed to appreciate its moral character; but it is difficult to conceive how the act could have been voluntary and intentional, where the faculties of the deceased were so impaired that he was not able to understand 'the general nature, consequences and effect of the act he was about to commit,' or when he was impelled thereto by an insane impulse which he had not the power to resist." In order to make the extract from the opinion of Justice HUNT consistent with itself, the words "general nature, consequences and effect of the act," must be taken to be an amplification of the words "moral character," immediately preceding, and to refer to the moral nature, moral consequences and effect of the act; and the last alternative must be regarded as an independent statement of the manner of the death of the assured, because it is impossible that the death could be caused by the voluntary act of the assured when he was "impelled thereto by an insane impulse which he had not the power to resist." Besides, this is evidently the construction put upon this passage by the Supreme Court of the United States in the subsequent case of *Bigelow v. Berkshire Life Ins. Co.* The language of the agreed statement denoting the state of mind of the assured having been adopted from the opinion in *Terry v. Ins. Co.*, must be regarded as having been used by the parties in the sense in which it was employed in that opinion, and as it appears from such statement so construed that the mind of the assured was only so far impaired that he did not understand the moral quality and consequences of his act, it follows from the views we have expressed that the defendant is not liable for the full amount of the policy. The judgment will therefore be reversed and the cause remanded, with directions to the Circuit Court to enter a judgment against the defendant for the net value of the policy at the time of the death of the insured.

Reversed and remanded.

All concur.

ALLEN V. COLLINS.

(70 Mo. 138.)

Limitation of action — acknowledgment to revive.

A demand is not taken out of the operation of the statute of limitations by a written acknowledgment found among the debtor's papers after his death. (See note, p. 417.)

ACTION on a note. The opinion states the facts. The defendant had judgment below.

Gill & South, for plaintiff in error, cited 2 Wag. Stat., §§ 28, 930; Ang. on Lim., §§ 270, 271; *Whitney v. Bigelow*, 4 Pick. 110; *Soulden v. Van Rensselaer*, 9 Wend. 293; *Bryar v. Wilcocks*, 3 Cow. 159; 1 Greenl. on Ev., § 150; *Carter v. Carter*, 44 Mo. 195; *Public Admr. v. Watts*, 1 Pai. 347; 1 Perry on Trusts (2d ed.), § 91; *Carr v. Hurlbut*, 41 Mo. 264; *Blue Hill Academy v. Ellis*, 32 Me. 268; *Baxter v. Penniman*, 8 Mass. 134; *Watkins v. Stevens*, 4 Barb. 171; *Hill on Trustees*, 61; *Pearce v. Dansforth*, 13 Mo. 360; *Renfro v. Harrison*, 10 id. 411; 2 Greenl. Ev., §§ 440, 441.

D. C. Allen, for defendant in error.

NORTON, J. The defendant in this case interposed the plea of the statute of limitations in bar of plaintiff's right of action on a note executed by his intestate to plaintiff, dated January 10, 1864, for \$134, due from its date. To take the case from under the operation of the statute plaintiff offered in evidence a certain writing contained in the private account book of defendant's intestate, signed by said intestate, purporting to be a will written in pencil. Said writing was not attested, and was found among the papers of the intestate after his death, and contained the following words: "That out of my estate she (alluding to his wife) shall pay all my just debts, including a debt due my mother of about \$400."

The only question presented in the case is whether the said writing was such an acknowledgment as would prevent the operation of the limitation law. The court below held that it was not sufficient, and gave effect to the defendant's plea of the statute, and this action of the court is assigned for error. There is a conflict

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of the authorities as to whether an acknowledgment or promise in writing, signed by the party to be bound, if made to a stranger would be sufficient to take a case from under the operation of the statute of limitations, but there is no conflict as to the necessity for such promise or acknowledgment being made to some person, either to the creditor or his representative, or to a stranger. A promise or acknowledgment implies that it is made to somebody, and in every promise there must necessarily be a promisor and promisee. The will in question was never attested, and was therefore no will. A mere writing acknowledging a debt, which is retained by the person making it, and which is never delivered either to the creditor or any one else, cannot have the effect of preventing the operation of the statute. In the case of *Merriam v. Leonard*, 6 Cush. 150, where the acknowledgment of the debt was contained in a mortgage duly executed and acknowledged, which was never delivered to the mortgagee, but was found after the mortgagor's death among his papers, Chief Justice SHAW held that it did not amount to an acknowledgment of the debt or of a willingness or intention to pay from which a promise could be implied. The deed was never delivered, and of course was not an instrument by which the signer was bound.

Judgment affirmed.

All concur except NAPTON, J.

NOTE BY THE REPORTER.—In *Duquid v. Schoolfield*, 33 Gratt. 808, it was held that a deposition of the maker of a note given and signed by him, in a case in which the obligee was not a party, for the purpose of obtaining a credit for it as to be paid by him, and for which he was allowed such a credit in that case, is such an acknowledgment of the debt by him as will defeat the plea of the statute of limitations in an action on the note by the obligee against him. The court said:

"There is no doubt the plaintiff, to maintain the issue on his part, was bound to prove the promise alleged in his replication. He was not required to prove an express promise. It was sufficient for him, under the statute, to establish an acknowledgment in writing, from which a promise of payment might be implied. Such acknowledgment, to be effectual, must not consist of equivocal, vague and indeterminate expressions; but ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable for and willing to pay. STONY, J., in *Bell v. Morrison*, 1 Pet. 351, 362. The same rule is laid down, with some variety of expression, by other judges. A distinct and unqualified acknowledgment would have the same effect as a promise, because from such an acknowledgment the law implies a promise to pay. TINDALL, C. J., in *Linsell v. Bunsor*, 2 Bing. N. C. 241 (29 Eng. C. L. 319). If an acknowledgment is relied on, says Judge PARKER, it ought to be a direct and unqualified admission of a present subsisting debt, from which a promise to pay would naturally and irresistibly be implied. *Sutton v. Burruss*, 9 Leigh, 351. If there be an unequivocal admission that the debt is still due and unpaid, unaccompanied by any expression, declaration or qualification indicative of an intention not to pay, the state of facts out of which the law implies a promise is then present, and the

party is bound by it. *Johnson, J., in Young v. Monpoe, 2 Bailey, 278.* It is needless to multiply authorities for the proposition stated, but the following may be consulted: *Evans v. Hall, 2 Pick. 388; 18 Am. Dec. 437; Baily v. Crare, 21 id. 323; Russell v. Copp, 5 N. H. 154; Head, Ex'r v. Warner's Adm'rs, 5 J. J. Marsh. 255; Peebles v. Mason, 2 Dev. 367; Applett's Ex'r v. Robinson, 9 Leigh, 45; Sutton v. Burruss, id. 381; Butcher v. Hiram, 4 id. 559; opinion of MONROE, J., in Bell v. Crawford, 8 Gratt. 110.*

"The next and only remaining ground of error alleged is, that the plaintiff not being a party to the suit in which the deposition was taken, the statements therein cannot be construed as admissions or acknowledgments made to him, and that no promise of payment can be implied from an acknowledgment of a debt so as to take it out of the operation of the act of limitations, unless such acknowledgment be made to the creditor to whom the debt is owing, or to some person representing him by authority.

"In *Joynes on Limitations, 120*, the learned author says of the question here presented, that 'since it has been established that a new promise, express or implied, is necessary to defeat a plea of the act of limitations, and that such new promise operates as a new cause of action, it has been frequently held, as it was before, that the promise need not be made directly to the creditor himself, or to any person representing him, or entitled to demand payment of the debt, but may be made to a third person, or inferred from an acknowledgment *inter alias*;' and he cites many cases in which the principle is applied.

"He refers also to several elementary works, among them 2 *Story's Eq. Juris. 600* (ed. 1843), in which the contrary doctrine is laid down and the authorities for it cited, which, in his opinion, do not sustain the text. But he concludes what he has to say on the subject with the remark (p. 123), that 'the doctrine in question certainly furnishes a valuable security against the inference which has too often been drawn from careless conversations with third persons, and tends strongly to advance the policy of the legislature.'

"Since the publication in 1844 of this excellent treatise on limitations, there have been numerous decisions, both in England and the United States, adverse to the views expressed by the distinguished author, and it is said, in a recent work of merit, that according to the very decided weight of the latest decisions in this country, a promise to pay a debt, made to a person not legally or equitably interested in the same, and who does not pretend to have had any authority from the creditor to call upon the debtor in relation to the debt, will not avoid the bar of the statute. In support of this proposition the following cases are cited, which we have examined, and they seem to be in point: *Ringo v. Brooks, 25 Ark. 540; Gillingham v. Gillingham, 17 Penn. St. 302; Moorehead v. Wriston, 73 N. C. 380; Parker v. Sherford, 76 id. 219; Wachler v. Albee, 80 Ill. 47; McGraw v. Forsyth, id. 380; Kistler v. Sanders, 40 Ind. 78; Sibert v. Wilder, 16 Kans. 176; s. c., 22 Am. Rep. 280; Fletcher v. Updike, 3 Hun. 350; Cape Girardeau County, v. Harbison, 58 Mo. 90; Trowsdale v. Anderson, 9 Bush. 276.* See, also, the cases referred to in notes of the American editors to *Whitcomb v. Whiting, 1 Smith's Lead. Cas., part 2, marg. p. 728*, where it is said to be well settled, both on authority and principle, that the debt will not be revived by an entry or memorandum, not forming part of a mutual account, on the books or papers of the debtor, or by a mere declaration or admission to a third person, meant only for his ear, and not intended to be communicated to the creditor.

"The diversity in the earlier and later decisions is attributable, for the most part, to the different and somewhat antagonistic theories entertained at different periods concerning the design and policy of the statute. Under the leadership of Lord MANSFIELD, it was for a long time considered and held that under the statute lapse of time raises a mere presumption of satisfaction, which, like other presumptions, might be repelled, and hence that a new promise of the debtor, whether express or implied, was only evidence of the pre-existing debt and gave no new cause of action. Subsequently, this theory was overturned and succeeded by a course of decision, initiated and fostered by Chief Justice BENT, which regarded and construed the statute as one of repose, and the new promise as a new contract and actionable as such. This view is now generally accepted. *Sibert v. Wilder, 16 Kans. 176; s. c., 22 Am. Rep. 280*, and cases cited. It would seem to follow logically that the promise, to be sufficient to take a case out of the statute, should be made directly or mediately to the creditor or at least for his benefit, so that he may be able to maintain an action upon it. It is said that the declaration or admission to a third person is deemed insufficient, not so much because the acknowledgment is made to a stranger as because

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there is no sufficient evidence of an intention to contract. 1 Smith's Lead. Cas., part 2, marg. p. 978.

"We do not consider the judgment under review as conflicting with the recent decisions which have been cited. The deposition of the plaintiff in error was given, probably, at his own instance, for the very purpose of establishing, among other claims, the validity and binding force upon him of the debt, the recovery of which is now sought to be defeated by reliance on the act of limitations, and it was because of his sworn statements that he received credit for the debt on his bonds. He must therefore be understood to have intended that his acknowledgment of the debt, under the attending circumstances, should be accepted as such and confided in and acted upon by the creditor to whom the debt was due. He cannot be allowed to take the benefit of the acknowledgment and then repudiate its obligation."

The cases cited in the note to *Whitney v. Whitcomb*, Smith's Lead. Cas., part 2, marg. p. 738, are *Edwards v. Culley*, 4 H. & N. 378; *Bloodgood v. Bruen*, 4 Seld. 362; *Badger v. Arch*, 10 Exch. 341; *Grenfell v. Girdlestone*, 3 Y. & C. 676; *Kyle v. Wells*, 5 Harris, 286; *Gillingham v. Gillingham*, 1d. 302; *Pearson v. Darrington*, 33 Ala. 257; *Reeves v. Correll*, 19 Ill. 159. The editor says this doctrine "is not so much because the promise is made to a stranger, as because there is no sufficient evidence of an intention to promise." "The view thus taken is better founded than that which prevailed in some of the earlier cases, where any acknowledgment from which the continued existence of the debt could be inferred was deemed sufficient, whether made to a third person or to the plaintiff in the action. *Newirk v. Harrington*, 5 Harr. 38; *McRea v. Kennon*, 1 Ala. (N. S.) 266; *Soulden v. Van Rensselaer*, 9 Wend. 297; *McRea v. Furmort*, 16 id. 477; *Titus v. Ash*, 4 Wooster, 319; *Phillips v. Peters*, 21 Barb. 351; *Watkins v. Stevens*, 4 id. 166; *Carshore v. Huxk*, 6 id. 355; *Whitney v. Bigelow*, 4 Pick. 110; 13 Am. Rep. 437; *Minkler v. Minkler*, 16 Vt. 198; *Oliver v. Gray*, 1 Harr. & G. 204; *Bird v. Adams*, 7 Ga. 505; *St. John v. Garrou*, 4 Port. 225; *Monsiephen v. Brook*, 3 B. & Ald. 141; *Clark v. Hougham*, 3 B. & C. 140." To this effect is *Katz v. Moessinger*, 7 Bradw. 536.

McRea v. Kennon and *Bird v. Adams*, *supra*, held that a promise by maker to former holder of a note inured to a later holder. *Soulden v. Van Rensselaer*, *supra*, that a promise to a present holder inured to a later holder. The other cases cited by Smith were of promises to entire strangers.

In *Edwards v. Culley*, 4 H. & N. 378, POLLOCK, C. B., said, *obiter*: "If a debtor had written in a book a private memorandum of his debt, and the creditor got hold of the book and produced it in court, that would not be an acknowledgment to take the case out of the statute, because no promise to pay could be inferred from it."

In *Bloodgood v. Bruen*, 4 Seld. 362, it was held, reversing the decision in 4 Sandf. 362, that no promise could be implied from an acknowledgment in an answer to a bill in chancery filed by a third person, or drawn out from the debtor while testifying as a witness; the promise must be made to the creditor or his agent.

But an acknowledgment or promise to a third will inure to the original promisee, if made upon a consideration or intended to be communicated to him. So, in *Collett v. Frazier*, 3 Jones Eq. 80, where a dying man said to a bystander that he owed the plaintiff so much for a slave, which he desired to have paid, and in *Jordan's Adm'r v. Hubbard*, 25 Ala. (N.S.) 433, where decedent told A. that he could not live long, and did not expect to see B. (his administrator), but wanted A. to bear witness that he wished B. to pay his debt to C. And in *Evans v. Cory*, 29 id. 99, where A. and B. met at the house of a common relative, and the latter refusing to speak to him, A. complained to C., who said it was because B. had suffered as indorser for him, whereupon A. said if B. had paid any thing for him he was able and willing to pay it. These cases are cited by Smith, but the two latter lose force from the fact that the court said that the acknowledgment was valid if made to a third person, without dwelling on the intention to have it communicated.

In *Ross v. Ross*, 13 N. Y. Sup. Ct. 80, an executor put in his inventory an outlawed debt made by him to the testator. Held, a sufficient acknowledgment in writing to take it out of the statute. So, where a testator, in preparing his will, admitted the justice and validity of a debt, and when he executed the will, prepared a schedule of the indebtedness, and acknowledged that he was willing to pay it. *Rogers v. Southern*, 4 Baxt. 87. So, of an inventory and affidavit of a debt made to procure a discharge in insolvency. *Bryar v.*

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Willcocks, 3 Cowp. 159. A recital in a mortgage that it is subject to a prior one by the same mortgagor to another on the same premises is sufficient to take the former out of the statute. *Pulmer v. Butler*, 36 Iowa, 576. Otherwise, where a petitioner for discharge in insolvency included an outlawed claim in his schedule. *Geo. Ins. Co. v. Elliott*, Tansy, 130. In *Bluehill Academy v. Ellis*, 32 Me. 360, it was held that charges made by the treasurer of a corporation against himself in the corporation books, for interest on his note, are recognitions of the debt sufficient to remove the bar of the statute.

LOWRY V. RAINWATER.

(70 Mo. 153.)

Constitutional law—suppression of gambling—destruction of tables.

A statute authorized the police to seize gambling tables and gaming devices used for gambling, and made it the duty of the president of the police to cause the same to be publicly destroyed. This could be done without notice to the owner or any semblance of a judicial investigation. *Held*, unconstitutional.

ACTION of damages for destruction of personal property. The opinion states the facts. The plaintiff had judgment below.

E. F. Farish, for appellant. The destruction of property constituting a common-law nuisance, when committed for the public safety or health, is sanctioned. In abolishing a nuisance, property may be destroyed and the owner deprived of it without trial, without notice and without legal compensation. *Manhattan Manfg. Co. v. Van Keuren*, 23 N. J. Eq. 251; *Coe v. Schultz*, 47 Barb. 64; *Potter's Dwar.* on Stat. 444; *Cooley* on Const. Lim. 572; *Guillotte v. New Orleans*, 12 La. Ann. 432; *Mayor of Mobile v. Zuille*, 3 Ala. 137.

John D. Johnson, for defendant in error.

HENRY, J. The petition alleged substantially that on the 19th day of May, 1874, the defendants Watkins, Huthsing, Gardner and Hamilton, at the instigation of defendants Rainwater and Huebler, being by them employed and assisted, with force, etc., broke and entered the house and dwelling of plaintiff, in the city of St. Louis, and took and carried away an extension dining table, the property

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of plaintiff, of the value, etc., and destroyed it to his damage, etc. Defendants pleaded in justification, that the defendant C. C. Rainwater was at that time vice-president of the board of police commissioners of the city of St. Louis and acting president, and, as such, under and in pursuance of the act to establish said board, issued his warrant to defendant Huebler, an officer of the police force; that at said time and at the place named in the petition, there was kept a prohibited gaming table, or other gaming device, of which said acting president had received satisfactory information, and that said officers charged with the execution of said warrant did, in pursuance of said act, for the purpose of executing said warrant, break open the doors, and for that purpose, had the assistance of the other defendants as members of the police force, and that in pursuance of said act of the general assembly, they caused said prohibited gaming table to be publicly destroyed, and that the wrong complained of by defendant was the above and no other.

On the pleadings the Circuit Court rendered judgment for plaintiff, which was affirmed at General Term, and on appeal to the Court of Appeals was by that court affirmed, and is now here on appeal from that judgment. Since this case was decided by the Court of Appeals, that of *McCoy v. Zane* was decided by this court (65 Mo. 13), wherein this court intimated an opinion that sections 24, 26 and 27, Wag. Stat. 503, are constitutional. These sections are identical with sections 5, 6 and 7 of the act creating the board of police commissioners for the city of St. Louis, except that sections 24, 26 and 27 of the general statutes confer the power upon any judge or justice of the peace, which by the police commissioners act is conferred upon the acting president of the board.

Section 5 of the act creating a board of police commissioners provided that: "Whenever the acting president of said board (in the general statutes 'any judge or justice of the peace') shall have knowledge or shall receive satisfactory information that there is any prohibited gaming table, or other gaming device, kept or used in the city of St. Louis, he shall have power to issue, and it shall be his duty forthwith to issue a warrant directed to some officer of the police force under said board (in the general statutes 'to the sheriff or any constable') to seize and bring before him such gaming table or other gaming device."

Section 6. "The officer charged with the execution of such

warrant shall have power, if necessary, to break open doors for the purpose of executing the same, and for that purpose may have the assistance of the whole police force."

Section 7. It shall be the duty of such acting president (in the general law 'of the judge or justice of the peace') before whom any such prohibited gaming table or gaming device shall be brought, to cause the same to be publicly destroyed by burning or otherwise."

In *McCoy v. Zane* the constitutionality of the sections upon which the proceedings of Judge HENDRICKS were based was not considered by this court, NAPTON, J., observing that "in view of the conclusions we have reached in the case, it is unnecessary to determine the questions which have been so extensively discussed by the counsel in regard to the constitutionality of these statutory provisions." It is, therefore, in this State, an open question with which we are in this case directly confronted. By the general law a judge or a justice of the peace, and by the act establishing the board of police commissioners, the acting president of the board may issue his warrant directing a constable, or police officer, to bring before him any gaming table or gaming device alleged to be used for gaming purposes, and without any further investigation, order its destruction. A legislative act which authorizes an officer, without notice to the owner, or even the semblance of a judicial investigation, to seize and destroy the property of a citizen, cannot be sustained under a Constitution which declares that "no State shall deprive any person of life, liberty or property without due process of law." Lord COKE says that the words "*per legem terras*" mean by due process of law, and being brought into court to answer according to law. In the language of CURTIS, J., in *Greene v. Briggs*, 1 Curtis, 325, the words "*law of the land*" do not mean any act which the assembly may choose to pass. If it did, the legislative will could inflict a forfeiture of life, liberty or property without a trial. The exposition of these words as they stand in *magna charta*, as well as in the American Constitutions, has been that they require "due process of law," and in this is necessarily implied and included the right to answer to and contest the charge, and the consequent right to be discharged from it unless it be proved." In Cooley's Constitutional Limitations, p. 362, the learned author says: "Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial

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proceedings in which the forfeiture shall be declared in due form." Forfeitures of rights and property cannot be adjudged by legislative acts, and confiscations without a judicial hearing after due notice would be void as not being due process of law. Id. 305. Judge SELDEN, in *Weynhauser v. People*, 3 Kern., said the words due process of law must be understood to mean that no person shall be deprived by any form of governmental action of either life, liberty or property, except as the consequence of some judicial proceeding appropriately and legally conducted. Judge COOLEY, in his work on constitutional limitations, speaking of laws to prohibit the sale and manufacture of intoxicating drinks as a beverage, declaring them a nuisance and providing for their condemnation and destruction, remarks that "it is only where, in framing such legislation, care has not been taken to observe those principles of protection which surround the persons and dwellings of individuals, securing them against unreasonable searches and seizures, and giving them a right to trial before condemnation, that the courts have felt at liberty to declare that it exceeded the proper province of police regulation." We doubt if a case can be found in any State in the Union sustaining an act conferring such power upon a judge, justice of the peace, police commissioner or any other officer as the president of the board of police commissioners is invested with, by the sections 5, 6 and 7 of the act establishing that board; similar, but infinitely less obnoxious, acts have been held void in Massachusetts (1 Gray, 1), in Michigan (4 Mich. 126), and in other States. In *Lincoln v. Gray*, 27 Vt. 355, the court observes of their statute for the seizure and destruction of intoxicating liquors: "It would be somewhat remarkable if an enlightened legislature at the present day should pass a law with an intention to have liquors adjudged forfeited by a judicial tribunal, and ordered to be destroyed, without a trial and without proof that they were intended for sale contrary to law, and we apprehend that the statute does not require us to put the legislature who passed this act in so awkward a dilemma." If valid, what we have regarded as guarantees of our rights of property, both in the Federal and State Constitutions, are unmeaning phrases, calculated to lull us into a sense of security rather than to afford us protection against invasions of what we have regarded as sacred rights.

We are not unmindful of the duty of the courts to weigh carefully all that may be urged in favor of the validity of an act of the

legislative department of the government, before declaring it in conflict with the organic law, and only to announce such a conclusion when no doubt is entertained of its correctness. After a careful examination of the 7th section of the act under consideration, and numerous adjudications of the courts of other States bearing upon the question involved, we are satisfied that it is in conflict with the 14th amendment to the Federal Constitution, and therefore invalid.

If the 7th section fall the 5th cannot stand, for it authorizes an arbitrary seizure of the property, with no provision made for its disposition. The officer before whom it may be taken may hold it against the owner indefinitely. He cannot by suit recover it, because, assuming the constitutionality of the section, the seizure of the property, as well as the holding by the officer, would be lawful. It is "an unreasonable seizure" of private property and a violation of section 23, article 1, of the Constitution of 1865. An act which, under the pretext of preserving public morals, provides for the seizure of private property, should also provide a summary mode of judicial proceedings for determining whether it is the kind of property and was used or held for purposes condemned by the act. Even to authorize the property to be seized and held until in an ordinary action at law for the recovery of his property the claimant should negative the allegations in the warrant of seizure, would be oppressive and unjust, and not in harmony with the spirit of our Constitution. Hence a statute which authorizes a seizure of private property under a warrant issued in pursuance of provisions such as are contained in section 7, should also afford a speedy trial to ascertain whether the property is of the character and is used or held for purposes condemned by the act, and making provision for duly notifying the owner and giving him his day in court. The constitutional safeguards thrown around the rights of property are not to be demolished in order to suppress gambling or gambling houses. The vices which acts authorizing these summary proceedings propose to eradicate are inconsiderable in comparison with the value of the constitutional guarantees which secure to the citizen his liberty and his property. We recognize the right of the State to adopt, and the propriety of a rigorous enforcement of, laws for the suppression of gambling and gambling houses, but these laws may be so framed as to harmonize with those constitutional provisions, and hasty and inconsiderate legislation which disregard them cannot be upheld.

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We are of the opinion that the 5th section, standing by itself, is in conflict with the Constitution, and holding that the 7th section is void, the 5th does not stand alone, and is also void. The cases cited in the discussion of the constitutionality of the 7th section we think fully sustain our views in regard to the 5th section. We express no opinion on that phase of the constitutional question with respect to the 5th section, discussed by the Court of Appeals. All concurring, the judgment is affirmed.

Judgment affirmed.

BUNN V. JETMORE.

(70 Mo. 228.)

Surety — on bond not signed by principal.

A surety is not bound by any official bond conditioned to be, but not signed by the principal.*

ACTION on a constable's bond. The opinion states the case. The defendant had judgment below.

John J. Cockrell, for appellant.

Elliott & Jetmore, for respondent.

NORTON, J. This is a proceeding to recover of defendant as security of Perry R. Hazleton, constable of Hazle Hill township, Johnson county, the sum of \$50.15, money alleged to have been collected by said constable and not paid over to the party entitled to receive it. The suit is founded on the following instrument of writing, viz.: "Whereas the undersigned, Perry R. Hazleton, was, on the 13th day of September, 1874, duly appointed to the office of constable of Hazle Hill township, in the county of Johnson and State of Missouri, and has accepted and is about to enter upon the duties thereof, Now, therefore, know all men by these presents, that we, Perry R. Hazleton, an principal, and S. Jetmore,

*To same effect *Russell v. Anable* (109 Mass. 72), 12 Am. Rep. 665; *Johnson v. Kimball Township* (20 Mich. 187), 33 Am. Rep. 372.

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Wm. McMahan, J. N. Stockton and J. T. Hamm, as securities, jointly and severally agree to pay each and every person who may be entitled thereto all such sums of money as the said constable may become liable to pay on account of any execution which shall be delivered to him for collection by virtue of his office, and all such damages as each and every person may sustain by reason of any malfeasance, misfeasance or non-performance on the part of said constable.

"S. JETMORE,
"W. MCMAHAN,
"J. N. STOCKTON,
"J. T. HAMM.

"Approved this 19th day of September, 1874.

JOHN L. TRAPP, Chairman Board.

"E. A. WILLIAMS,
"WM. P. GREENLEE."

The 6th section, article 5, of the township organization act, which act, at the time the above instrument was executed, was in force in Johnson county, provides that every person chosen or appointed to the office of constable before he enters upon the duties of his office * * shall execute, with two or more securities, an instrument in writing to the township trustee, to be approved by the township board of directors, in which said constable and his securities shall jointly and severally agree to pay to each and every person all such sums of money as said constable may become liable to pay on account of any execution which shall be delivered to him for collection by virtue of his office, and all such damages as each and every person may sustain by reason of any malfeasance, misfeasance or non-performance of duty on the part of said constable. Acts of 1873, p. 101. It will be observed that the writing in question is neither made to the township trustee as required by the said act, nor is it executed by Hazleton, the constable, mentioned therein as principal. In consequence of this omission or failure to make the instrument conform to the statute, and the non-execution of the writing by the principal, it is claimed that the said writing did not impose any liability on defendant as security. The trial court took this view of the subject, and rendered judgment for defendant, and it is this action which the plaintiff asks to be reviewed on his appeal.

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It is a clear requirement of the statute quoted, that Hazleton, the constable, should execute such an instrument in writing as is designated in section 6, *supra*. The writing offered in evidence, and on which defendant is sought to be made liable, does not show a compliance with this requirement, but on the contrary does show that never having been signed by the constable, it was never executed by him. It is however insisted that the writing, though never executed by the principal, is nevertheless binding on defendant who did execute it as security. The received doctrine is, that securities who execute a writing as such only can show in discharge of their liability, that their principal never was bound, and we can perceive no reason why that principle cannot be invoked in this case. This question was directly passed upon in the case of *Ward v. Washburn*, 2 Pick. 24, which was a proceeding against the securities of an administrator, on an administrator's bond. The bond was not signed by the administrator and because it was not, the court held that the sureties who had signed it were not bound. In the case of *Bean v. Parker*, 17 Mass. 591, it was expressly held that the securities on a bail bond, which had not been signed by the principal, were not liable thereon. Judgment affirmed, in which

Judgment affirmed.

STATE V. MEEK.

(70 Mo. 335.)

Criminal law—abortion—indictment.

An indictment for abortion is bad for not negating the statutory exception of a case when advised by a physician to be necessary to save the woman's life, such exception forming part of the enacting clause, although it alleges that it was not necessary to save the woman's life, and although the statute also provides that no indictment shall be deemed invalid for want of averment of any matter not necessary to be proved.

CONVICTION of abortion. The opinion states the case.

Shanklin, Low & McDougal and *John E. Wait*, for appellant.

J. L. Smith, attorney-general, for State.

HOUGH, J. The defendant was indicted for procuring an abortion. The section of the statute under which the indictment was drawn provides, that every person "who shall willfully administer to any pregnant woman any medicine, drug or substance whatsoever, or shall use or employ any means whatsoever with intent thereby to procure abortion or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose, shall, upon conviction, be adjudged guilty of a misdemeanor." The material portions of the indictment are as follows: "The grand jurors, etc., upon their oath, present that Orlando Meek, late of the county aforesaid, on the — day of December, 1874, at, etc., did willfully and unlawfully administer to one Arabella Tronsue, a woman then and there being pregnant with child, a large quantity of medicine, with intent thereby to procure abortion and miscarriage of the said Arabella Tronsue, the administering of said medicine to said Arabella Tronsue not being then necessary to preserve the life of said Arabella Tronsue; and the grand jurors further present that said Orlando Meek fled from justice in this cause in the month of May, 1875, and against the peace and dignity of the State. And the grand jurors aforesaid, upon their oath aforesaid, do further present that Orlando Meek, late, etc., on, etc., at, etc., did willfully and unlawfully administer to one Arabella Tronsue, a woman then and there being pregnant with child, a large quantity of medicine and drugs, with intent thereby to procure abortion and miscarriage of the said Arabella Tronsue, the administering of said medicine and drugs to said Arabella Tronsue not being then necessary to preserve the life of said Arabella Tronsue, and against the peace and dignity of the State."

The indictment, it will be perceived, fails to negative one of the exceptions contained in the statute defining the offense. The defendant moved to quash the indictment because it did not negative both of said exceptions. This motion was overruled, and the defendant was tried and convicted. A motion to arrest the judgment for the reasons stated in the motion to quash was also overruled, and the case comes here by appeal.

The indictment before us is in form like that in the case of the *State v. Van Houten*, 37 Mo. 557. The Circuit Court, in that case, quashed the indictment on a motion assigning as grounds therefor that it did not state facts sufficient to constitute an offense, and

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that it did not specify or describe the kind, quantity and quality of medicine alleged to have been administered. This court held that the Circuit Court erred in quashing the indictment "for the reasons set forth in the motion;" that it was unnecessary to allege the kind, quantity or quality of the medicine administered; and that the first cause assigned, that the indictment did not state facts sufficient to constitute any offense, was too general, and should have been disregarded, as under our statute a motion to quash must distinctly specify the grounds of objection. In that case, it will be seen, this court did not pass upon the effect of the failure to negative the exception referred to, for the reason that the point was not specifically presented in the motion to quash.

All the authorities agree that when the exception constitutes a part of the description of the offense sought to be charged, the indictment must negative the exception, otherwise no offense is charged. *State v. Shiflett*, 20 Mo. 415; *State v. Sutton*, 24 id. 377; *Commonwealth v. Hart*, 11 Cush. 130; *State v. Barker*, 18 Vt. 195. An indictment, which should charge simply that the defendant produced an abortion, would charge no offense under the statute; for abortion is an offense only when it is not necessary, and is not advised by a physician to be necessary to save the life of the mother. For the same reason it would be insufficient to charge only that abortion was produced when it was unnecessary to save the life of the mother, as it may have been advised by a physician to be necessary to save the mother's life, although in fact it was not so necessary; and in that event the statute declares that the person producing it is guilty of no crime. It is manifest, therefore, that when the exceptions are contained in the clause of the statute defining the offense and constitute a part of the description, the exceptions must be negated.

It may frequently happen, however, that the burden of proof as to one or more of the exceptions contained in a statute defining an offense, may, from the nature of the exceptions, be cast upon the defendant. Thus in the case of the *State v. Lipscomb*, 52 Mo. 32, which was an indictment for selling liquor without a license, this court said: "When the subject-matter of the negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party." But this rule does not dispense with the necessity for such averment; on the contrary, it plainly recognizes the propriety of such averments and

treats them as proved, unless disproved by the defendant. Thus in cases like the one before us, it has been held that while it is necessary for the State to produce some evidence that the abortion was unnecessary to save the life of the mother, the burden of showing that it was advised by a physician to be necessary for that purpose, is upon the defendant, and this for the reason that from the very nature of the case it might be impossible for the State to prove that such advice was not given, while testimony that it was so advised, being in its nature of a secret and confidential character and peculiarly within the knowledge of the defendant, could generally be easily produced by him. *Moody v. State*, 17 Ohio St. 110.

It is contended, however, on behalf of the State, that inasmuch as the burden of proof is not on the State as to the negative averment now under consideration, that under the statute of jeofails which declares that "no indictment shall be deemed invalid * * * for want of the averment of any matter not necessary to be proved," it is wholly unnecessary that the indictment should contain an averment that the abortion was not advised by a physician to be necessary for the preservation of the life of the mother. This argument is in our opinion unsound. The statute of jeofails above cited, was intended to apply only to immaterial averments, such as are not necessary constituents of the crime charged and need not in any way be made to appear. The exception we are considering is a part of the description of the offense, and therefore immaterial. Nor can it be said with legal accuracy that an averment as to this exception is not necessary to be proved; for under the rule laid down in the *State v. Lipscomb*, and *Moody v. State*, *supra*, it is to be considered as proved, if it is not disproved by the defendant. Surely the law would not be careful to declare that under certain circumstances we are to consider an averment as having been proved which it is unnecessary to prove. If testimony should be introduced by the defendant tending to show that he was within the exceptions, the State would have to rebut such testimony, or there could be no conviction. The argument for the State fails to distinguish between a rule of pleading and a rule of evidence.

It is quite plain to us that the statute was not intended to apply to negative averments the burden of disproving which is on the defendant, and which are to be taken as true unless disproved, but to immaterial averments which it is unnecessary for the State in any

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way to establish, by legal presumption or otherwise, as was the case in the *State v. Edmundson*, 64 Mo. 398. The principle here applied is constantly acted upon in trials under indictment for selling liquor without license. *State v. Jacques*, 68 id. 260. The judgment of the Circuit Court will be reversed and the cause remanded, with directions to the Circuit Court to quash the indictment.

Judgment reversed and cause remanded.

All the judges concur.

McCORMICK V. KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS
RAILROAD COMPANY.

(70 Mo. 339.)

Water and water-courses — surface water — concentration and discharge on neighboring lands.

One has no right to concentrate the surface water on his land and discharge it on his neighbor's, although it would naturally flow in that direction. (*See note, p. 436.*)

ACTION of damages for injury by surface water. The opinion states the case. The defendant had judgment below.

Ben. Loan, for appellant.

Willard P. Hall, for respondent.

NAPTON, J. When this case was here in 1874 (57 Mo. 433), the court clearly indicated the ground upon which the plaintiff's right of recovery must be based. The opinion in the case adopted the views of LOWRIE, J., in *Kauffman v. Griesemer*, 26 Penn. St. 415. And I doubt if they can be expressed more forcibly or plainly than in the very language of this eminent judge: "Where two fields adjoin," says Judge LOWRIE, "and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. * * * Hence the owner of the lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground shall be stopped; nor has the owner of the upper ground a right to make any excavations or

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drains by which the flow of water is diverted from its natural channel, and a new channel made on the lower ground; nor can he collect into one channel waters usually flowing off into his neighbor's fields by several channels, and thus increase the wash upon the lower fields. * * * If the owner of the upper ground wrongfully direct an unnatural quantity of water upon the ground of a lower neighbor, by collecting several streams together and discharging them at one place, or by any other means, the neighbor below may have an action against him." This principle is recognized by the Supreme Court of New York in *Waffle v. N. Y. Central R. R. Co.*, 58 Barb. 413. "Every person has the unquestionable right," says Judge THOMPSON of that court, "to drain the surface water from his own land, to render it more wholesome, useful or productive, or even to gratify his taste or will, and if another is inconvenienced or incidentally injured thereby he cannot complain. No one can divert a natural water course and stream through his land, to the injury of another, with impunity; nor can he, by means of drains or ditches throw the surface water from his own land upon the land of another to the injury of such other. But where a person can drain his own land without turning the water upon the land of another, or where it can be done by drains emptying into a natural stream and water course, there can be no doubt of his right thus to drain, even though the effect may be to increase the volume of water unusually at one season of the year, or to diminish the supply at another."

These general principles were in truth drawn from the Roman law, but fully recognized to be sound in English and American adjudications, and were the basis of the decision of this court when the case was here before. As Judge VORIES, who delivered the opinion of the court, observed: "The plaintiff complains that the defendant had so constructed its road that the embankment made therefor had collected a large body of surface and overflowed water on the east side of its road-bed, where the same adjoined the land of plaintiff, and that after said water had been so collected in a large body or pond, the defendant negligently and maliciously cut an artificial channel from said body of water through the embankment of its road-bed, and drained all of said large body of water on to plaintiff's land, by which plaintiff was damaged," etc. And the judge proceeded to say that an instruction to the jury which declared in effect that if the defendant did this act charged, in the

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manner charged, defendant was liable, was a proper instruction, and should have been given. The words "negligently and maliciously" seem to be merely ornamental in this case — it is immaterial about the motive or the care except as it affects the amount of damages. It is not likely that the defendant paid any attention except to the interests of the company, or put in the culvert for any purpose other than the protection of their road. The question is whether they had the right to do this to the injury of plaintiff.

The theory of the present action is based on the following facts stated in the amended petition: The plaintiff owns fifty acres of land on the west side of the railroad, and charges that on the east side of said road a large body of water was collected by the embankment on which the road was built, partly from the high lands adjoining, but principally from the overflow of Contrary creek, and the back water from it produced by a bridge over it, built by defendant, which is alleged to be too narrow to allow the water in heavy rains to pass through it, and that in 1870 the defendant put a culvert or box or artificial channel, which discharged all the water thus collected upon the plaintiff's land and produced the injuries complained of. As the plaintiff took a nonsuit because of the instructions given by the court, the only question for our consideration is whether these instructions were a fair exposition of the law to the jury, as it had been previously declared by this court, and since the propriety of instructions depends very much on the tendency of the evidence one way or another, and they are not designed to be mere abstractions, it is proper, in order to determine their propriety, to look into the facts sworn to and those denied by the witnesses at the trial.

The facts which the plaintiff's evidence tended to prove, whether to the satisfaction of the jury or not, is not material, were about these: The plaintiff was the owner of fifty acres of land on the west side of the defendant's railroad, and a portion of it, from two to four acres, was in a piece of low bottom two or three feet lower than the surrounding ground, and this low ground or basin extended over the road on the east side of it, to the extent of six or four acres — the witnesses differing as how the railroad divided the swag; all this low ground had been cultivated every year for twelve or sixteen years before the road was built. The road ran north and south and divided this bottom or basin, as has been stated, leaving two or four of the eight acres on the west side. Forty or fifty rods

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north of this basin, the road crossed a creek called Contrary creek, which ran from east to west, and a bridge was built over it by the defendant, which, however, in heavy rains and high water did not allow all the water to pass through, but backed up the water so as to flow back through the depression necessarily made by the embankment on which the track was laid, into the basin and occasioned a standing pond on the east side of the track, sometimes three or four feet deep, and occasionally, in heavy rains, overflowing the track. To prevent this, I suppose, the defendant in November, 1870, cut a sluice or box thirteen by eighteen inches in the lowest part of this depression, and this of course threw all this water, thus collected both from the high lands adjoining and from the back water of Contrary creek, when the rainy season of June, 1871, came on, into plaintiff's field, destroyed ten acres of corn he had planted there, filled up the cellar of his house, which is not in the basin, but thirty or fifty rods from it, ruined his well, destroyed his garden and perhaps occasioned ill health in his family.

Supposing these facts to have been established, the liability of defendant to an action for the damages occasioned thereby is plain if the doctrine asserted in this case before, and in all the cases on this subject, so far as I have observed, is to be adhered to. Let us then compare the instructions given with this theory of the law. The first instruction for defendant is as follows: "the defendant had a right to construct its railroad so as to permit the water in proof to flow as it would have done if said railroad had not been made. And if the jury believe from the evidence that if said railroad had not been made, the water in proof would have overflowed the land of plaintiff and would have done the same injury to plaintiff's land and premises, and to the crop of corn growing on said land, and made said land as wet and unfit for cultivation, as was done by the water flowing through the culvert in proof, they will find for defendant."

There was no evidence whatever to justify such an instruction. It was submitting to the jury a question of fact, upon which all the evidence as to the land before and after the road was built contradicted the hypothesis which they were authorized to find, and which, from its very nature, was impossible. The object of this instruction, as of the one succeeding it, seems to have been to impress upon the jury that if the same amount of water would have fallen on plaintiff's land, without any railroad embankment, that

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was conveyed to it through this artificial channel made by the defendant, the construction of this culvert or box was no ground of action. But this, as we have seen, is not the law. There is a great difference between allowing the surface water and the water accumulated by the overflow of the creek, to percolate through a thousand or ten thousand avenues, as it would have done if no railroad was there to intercept it, and by an embankment gathering it into one pond and precipitating it through a single channel upon plaintiff's land. And this is exactly what the court declared the defendant had a right to do, in the fourth instruction, and what this court declared in the former opinion the defendant had no right to do.

The fourth instruction is as follows: "The defendant had the right to construct all such culverts or drains as at any time might be found proper for the protection of the road-bed from water backed up against the road by overflow of a creek or excessive rains, although such culvert or drain may have caused such overflow or rain to flow in a different direction or greater quantity than it had done before such embankment or culvert was made; and in constructing such culvert defendant was only required to use reasonable care, considering all the circumstances at the time of such construction."

The fifth instruction is as follows: "Though the jury find from the evidence that in June, 1871, the stream called Contrary creek broke through or overflowed its natural banks and passed into the basin mentioned, and through the culvert or waterway placed in said basin by defendant, under or across the embankment made by defendant, dividing said basin, and upon plaintiff's land, and thereby caused the injuries complained of herein, yet the jury must find for defendant, unless they further find from the evidence that said stream did, at the time of the injury so complained of, break through or overflow its banks in the manner and with the effect as above stated, in consequence of improper or negligent construction of the bridge across said stream used as a railroad bridge by defendant."

This instruction is of the same complexion as the others which were given. It evades the gravamen of the charge, which was the precipitation of a large body of water collected by the road-bed on the plaintiff's land. It is immaterial how the water got there, whether by natural channels from the hills or highlands, or by

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back water from the creek; the defendant had no right to concentrate it in a single channel and force it on to plaintiffs' land. This is the doctrine as established by all the authorities, and the sufficiency or insufficiency of the bridge was entirely immaterial if the back water from the creek did in point of fact find its way into this basin. The defendant had a right undoubtedly to protect its road, and to do so had an unquestionable right to draw off the water, but not so as to be injurious to his neighbor. It must be drawn off in some natural channel—some stream in the vicinity, if any such existed, or by a variety of channels, or in short, by any means defendant might select or prefer, provided no damage was done to others by the plan adopted. The instruction in regard to damages was correct. If no evidence was given in relation to the pecuniary losses of plaintiff the jury would of course have no basis on which to find more than nominal damages.

In regard to the evidence excluded of the witness Rector, the court may have been right on the theory of the case adopted by the Circuit Court, but I think the evidence was of no consequence, and whether excluded or admitted was immaterial, since other evidence clearly showed that the elevation of the embankment of the road would necessitate a consequent proportionate depression, and this depression would suffice to carry off the back water down to the basin or pond. The evidence, I think, should have been admitted upon the theory which this court sanctioned, but it was not material to a recovery.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

NORTON and HENRY, JJ., concur.

NOTE BY THE REPORTER. — HUGH, J., dissenting in this case, said: "When this case was before this court in 1874, Judge VORLES, in delivering the opinion of the court, said: 'The general rule, however, is, that either municipal corporations or private persons may so occupy and improve their land and use it for such purposes as they may see fit, either by grading or filling up low places, or by erecting buildings thereon, or by making any other improvement thereon to make it fit for cultivation or other profitable or desirable enjoyment; and it makes no difference that the effect of such improvement is to change the flow of the surface water accumulating or falling on the surrounding country, so as to either increase or diminish the quantity of such water which had previously flowed upon the land of the adjoining proprietors to their inconvenience or injury. *Ang. Wat. Courses*, p. 122, § 108, and following, and cases there cited; *Goodale v. Tuttle*, 29 N. Y. 428; *Waste v. N. Y. C. R. R. Co.*, 58 Barb. 413; *Turner v. Inhabitants, etc.*, 13 Allen, 231; *Miller v. City of Springfield*, 55 Mo. 119, and cases there cited. The same rule would apply to water flowing over the country which had escaped from the banks or natural channel of a running stream of water by reason of a flood in the stream occasioned by heavy rains or the melting of snow upon the surrounding country.' In the further discussion of this

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subject. Judge VORLES, in speaking of the rights of the owner of land, said: 'He must improve and use his own lands in a reasonable way, and in so doing he may turn the course of and protect his own land from the surface water flowing thereon, and he will not be liable for any incidental injury occasioned to others by the changed course in which the water may naturally flow, and for its increase upon the land of others. Each proprietor in such case is left to protect his own lands against the common enemy of all. In the present case the plaintiff complains that the defendant had so constructed its road that the embankment made therefor had collected a large body of surface and overflowed water on the east side of its road-bed where the same adjoined the land of plaintiff, and that after said water had been so collected in a large body or pond, the defendant negligently and maliciously cut an artificial channel from said body of water through the embankment of its road-bed, and drained all of said large body of water on the plaintiff's land, by which plaintiff was damaged, etc. The first instruction asked by the plaintiff told the jury in effect, that if the defendant did this act charged in the petition in the manner therein charged, the plaintiff had a right to recover. We think this instruction ought to have been given.'

"There can be no question as to the correctness of these views, and I have made such copious extracts from the opinion of the court for the reason that it was delivered in the same case now before us. The testimony in the cause was not preserved in the former bill of exceptions. The transcript simply stated that there was testimony tending to prove the allegations of the petition. Now the case is materially different. The testimony shows that the defendant did not collect a large body of water on the east side of its road-bed, and after so collecting it, construct an artificial channel and precipitate the whole thereof upon the plaintiff. Judge VORLES recognized the right of the defendant to drain the surface water from its road-bed so as to preserve the same for continued and profitable use, and said that such drainage should be made by means of culverts or otherwise, 'so as to occasion no unnecessary inconvenience or damage to plaintiff,' citing *Kaufman v. Grisesmer*, 26 Penn. St. 415, and note; *Waffle v. N. Y. C. R. R. Co.*, 58 Barb. 413. These cases were suits for the obstruction of water courses or running streams, and not for the diversion of surface water, and the opinion of the court as to the right of the owner of land to protect it against surface water is not based upon them, as a reference to the cases cited will show. Yet in the first of these cases, *WOODWARD, J.*, who delivered the opinion of the court, after citing *Martin v. Biddle*, and other cases, said: 'These cases recognize the principle that the superior owner may improve his lands by throwing increased waters upon his inferior through the natural and customary channels, which is a most important principle in respect not only to agricultural, but to mining operations also.' And in *Martin v. Biddle*, which was the case of a running stream, *LOWRIE, J.*, speaking of the land owner, said: 'So, also, he may use proper means of draining his ground where it is too moist, and discharge the water according to the natural channel, even though the flow of water upon his neighbor be thereby somewhat increased.' See *Noonan v. City of Albany*, post.

STATE V. HORN.

(70 Mo. 466.)

Bail—principal imprisoned in another State.

A surety in a recognizance is not released by the inability of the principal to fulfill the condition, by reason of his conviction and imprisonment in another State.*

*See *Cooper v. State* (5 Tex. Ct. App.), 39 Am. Rep. 571; *State v. Merrithew* (47 Iowa, 112), 39 Am. Rep. 464.

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SCIRE FACIAS on a recognizance. The opinion states the case. The plaintiff had judgment below.

J. L. Smith, attorney-general, for State.

NAPTON, J. This was a recognizance taken by the State against Horn and Cherry, in which Cherry obliged himself in a penalty that he would be responsible for Horn's appearance to answer an indictment against him. The defense was that Horn was prevented from performing the conditions of the recognizance by reason of his arrest in Illinois, and his trial and conviction and sentence to the penitentiary of that State. This defense was held invalid. This was so held, in accordance with the opinion of the Circuit Court of the United States in *United States v. Van Fossen*, 1 Dill. C. C. 406, and of the Supreme Court of Tennessee in *Devine v. State*, 5 Sneed, 623, and of Connecticut, in *Taintor v. Taylor*, 86 Conn. 242; s. c., 4 Am. Rep. 58. As we concur in these opinions it is unnecessary to examine the questions decided, and we therefore affirm the judgment.

Judgment affirmed.

The other judges concur.

COOK V. CONTINENTAL INSURANCE COMPANY.

(70 Mo. 610.)

Insurance — "unoccupied."

A policy of insurance upon a dwelling-house was conditioned to be void if the premises should become unoccupied. The insured left the house and went elsewhere to reside, taking only part of her furniture. She left a man in possession with instructions to sleep in the house at night. This man quit the premises, and several days afterward a fire occurred, no one being in the house at the time. *Held*, that the house was unoccupied and the policy was void. (*See note*, p. 443.)

Snoddy & Short, for appellant, cited in argument *Kelly v. Home Ins. Co.*, 2 Cent. Law Jour. 478; *Ellington v. Moore*, 17 Mo. 424; *Poor v. Humboldt Ins. Co.*, 125 Mass. 274; s. c., 28 Am. Rep. 228; *Hartford Ins. Co. v. Smith*, 3 Col. 422; *American Ins. Co. v. Pad-*

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field, 78 Ill. 167; *Chamberlain v. Ins. Co.*, 55 N. H. 249; *Hill v. Equitable Fire Ins. Co.*, N. H. Sup. Ct. (1877); 6 Ins. Law Jour. 314; *Harrington v. Fitchburg Mut. Fire Ins. Co.*, 124 Mass. 126; *Livingston v. Stickles*, 7 Hill, 255; *Callin v. Springfield Ins. Co.*, 1 Sumn. 434; *Breasted v. Farmers' L. & T. Co.*, 4 Seld. 305; *Ins. Co. v. Slaughter*, 12 Wall. 404; *Rann v. Home Ins. Co.*, 59 N. Y. 387; *Reynolds v. Com. Ins. Co.*, 47 id. 597; *Hynds v. Schen. Ins. Co.*, 11 id. 554; *Commercial Ins. Co. v. Robinson*, 64 Ill. 265; s. c., 16 Am. Rep. 557.

G. G. Vest and Phillips & Jackson, for respondent.

HENRY, J. This is an action on a policy of insurance issued to plaintiff by defendant on the 14th day of February, 1873, on plaintiff's dwelling-house in the city of Sedalia, by which defendant, in consideration of \$45 paid by plaintiff, agreed to make good to her all such immediate loss or damage not exceeding \$2,000 as should happen by fire to said house from the 14th day of February, 1873, at 12 o'clock noon, to the 14th day of February, 1874, at 12 o'clock noon. On the 26th day of October, 1873, said property was totally destroyed by fire, and this action was to recover of defendant the amount for which the property was insured. A motion to set aside nonsuit taken with leave was overruled, and plaintiff appealed. It was stipulated in the policy that "if the premises become unoccupied without the assent of the company indorsed hereon, then, and in every such case, the policy shall be void." What is the meaning of the term "unoccupied" as employed in that clause of the policy? This is the principal question for determination. About two weeks before the fire the plaintiff went to Kansas City, Missouri, to reside, and lived there until after the fire. She shipped a car load of her furniture to the latter place, and left about \$300 worth in the house, and instructed one Barnard to sell it, except a bed-room set, and also to rent the house. Joseph Southwick was left in possession, with instructions to remain in possession and sleep in the house until he could rent it. DeLaney was to rent the house. Southwick went to Kansas City three or four days before, and was there when the fire occurred. He left no one in the house, but told DeLaney, with whom he left the keys, except the key of the room he had slept in, to take charge of the house and rent it if he could before he returned. The above is the testi-

mony of plaintiff and Southwick. Her evidence is somewhat contradictory as to whom she gave authority to let the house.

On these facts the question arises, was the house unoccupied when it was burned? If it was she was not entitled to recover. "Occupation of a dwelling-house is living in it." *Paine v. Ag. Ins. Co.*, 4 T. & C. 619. "A fair and reasonable construction of the language 'vacant and unoccupied,' is that it should be without an occupant—without any person living in it." 78 Ill. 169. Speaking of a dwelling-house and barn, COLT, J., in *Ashworth v. Builders' Ins. Co.*, 112 Mass. 422; s. c., 17 Am. Rep. 117, observed: "Occupancy, as applied to such buildings, implies an actual use of the house as a dwelling place, and such use of the barn as is ordinarily incident to a barn belonging to an occupied house, or at least something more than a use of it for storage. The insurer has a right, by the terms of the policy, to the care and supervision which is involved in such an occupancy." Citing *Keith v. Quincy Mut. Fire Ins. Co.*, 10 Allen, 228. In Wood on Insurance, p. 164, the above observations of COLT, J., are quoted and approved. In *Paine v. Ag. Ins. Co.*, 5 N. Y. S. C. 619, it was said that "occupation of a dwelling-house is living in it, not mere supervision over it, and while a person need not live in it every moment, there must not be a cessation of occupancy for any considerable portion of time." On page 181 Mr. Wood says: "A practical occupancy consistent with the purposes for which it was insured is intended, and an occupancy that measurably lessens the vigilance and care that would be incident to its use for such purposes is not an occupancy within the meaning of the term as thus employed." Wood on Fire Ins. In *Whitney v. Black River Ins. Co.*, 9 Hun, 39, it was held that "the words 'vacant and unoccupied' must be construed with reference to the kind of structure or building on the premises. Occupation of a dwelling-house is living in it." In *Keith v. Quincy Ins. Co.*, 10 Allen, 228, the suit was on a policy insuring a trip-hammer shop and machinery therein, and the policy contained a provision that if the building remained unoccupied for the period of thirty days without notice to the company, the policy should be void." The facts were, that for more than thirty days before the loss, the shop was unoccupied for the business, but the tools and machinery were there, and the plaintiff's son went through the shop almost every day to see that every thing was right. And an instruction that these facts

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did not constitute occupancy, but that some practical use must have been made of the building, was approved by the Supreme Court of Massachusetts. Counsel for appellant say that this case has been qualified, but as we have seen in *Ashworth v. The Builders' Ins. Co.*, 112 Mass. 422; s. c., 17 Am. Rep. 117, it was cited in support of the doctrine enunciated there.

Applying the doctrines of the above cited cases to this, it is clear, that within the meaning of the clause under considerations, the premises insured were unoccupied from the time plaintiff went to Kansas City until the fire occurred. In the trip-hammer case the tools and machinery were left in the shop, and plaintiff's son went through the building nearly every day to see that all was right. In *Paine v. Ag. Ins. Co.*, 5 T. & C. 619, the party who resided in the house left all his furniture there, and although absent five or six weeks, frequently returned and looked after the house, and a person living near by visited the house frequently, and maintained a general supervision over it, yet it was held that the assured could not recover. When this policy was issued, the plaintiff kept what witnesses called a "Ladies' Boarding House," and had eight girls with her. After she had left the premises, there was no one living in it. She lived in Kansas City, and Southwick was, by her, instructed to sleep in the house, but he did not sleep in it after Wednesday night next preceding the Saturday night of the fire. His sleeping there at night was not an occupation of the house within the meaning of the policy. He did not occupy the house during the day. It is true that there is more danger from incendiaries at night than in the day-time but dwelling-houses unoccupied during the day are in more danger from that class than when occupied, and the abandonment of the premises by plaintiff diminished the security against the destruction of the house by fire.

It will be observed that the condition avoids the policy if the premises become unoccupied, without regard to the period of time that they remain unoccupied, therein differing from the cases cited; and giving it a liberal construction, while the temporary absence of the entire family for a day, or a few days, might not avoid the policy, yet if the family occupying the house abandon it, as in this case, for another residence, requesting a person to sleep there until it should be rented, and such person leaves the place several days before the fire occurs and remains away until it is consumed by fire, with what propriety can it be said that it was "occupied" when

burned? If the absence of plaintiff had been for a visit, and not to change her residence, the case might (we do not say would) be different. "Occupation of a dwelling-house is living in it." "A mere supervision over it is not sufficient." It was plaintiff's business, under the policy, to see that the house was occupied. If she had put a tenant in possession under a lease for a month, or a year and four days previous to the fire the tenant had vacated the premises and taken another house, her agreement with that tenant would not have availed her in a suit with the insurance company. So her instructions to Southwick, admitting that the observance of them by him would have saved the policy, cannot avail her, if with or without her consent, he did vacate the premises several days before they were burned. He slept there at night when in Sedalia, but did not take his meals there; was not there during the day. He was not living in the house, and this is not the case of an occupant of the house who was but temporarily absent when the fire occurred; and the Circuit Court did not err in holding that the house was unoccupied when burned.

The fourth instruction asked by plaintiff, which, it is alleged, was refused by the court, is on the margin so marked, but in the body of the bill of exceptions it is shown that it was given. It declared that every temporary absence does not constitute non-occupancy, and that if when plaintiff removed from the premises to Kansas City, she left Southwick in possession with instructions to remain until he could rent the house, then such removal on her part was not a violation of the policy in regard to occupancy. The mere fact of her removal would not have been a violation of that stipulation of the policy, but her removal from the premises and simply directing Southwick to remain there and sleep in the house, unless he did so (if that would) certainly did not obviate the effect of her vacating it, and the court might properly have refused the instruction. It was calculated to mislead the jury into finding that the premises were occupied on the sole ground that plaintiff had given Southwick such instructions.

The fifth asked by the plaintiff was erroneous, and the court did not err in refusing it. An offer to compromise never estops the party making it from setting up any legal defense or asserting any right to which the offer of compromise relates. For the same reason the fifth instruction for defendant was properly given, nor

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was any error committed on the trial which would warrant a reversal of the judgment. It is therefore affirmed.

Judgment affirmed.

All the judges concur.

NOTE BY THE REPORTER.—See *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; 34 Am. Rep. 106. In *Stupetski v. Transatlantic Fire Ins. Co.*, Michigan Supreme Court, April, 1880, by a condition in a fire policy on a dwelling it became void if the house should "become vacant or unoccupied without the assent of the company." The insured used the premises as his own dwelling. About ten days before a fire by which it was destroyed he received a dispatch summoning him to the bedside of his dying daughter, in another State, and with his wife left the house alone, and did not return until after the fire. A son who lived near by, under the direction of insured, visited the house daily during his absence to look after the premises and stock thereon. Held, that the house was not "vacant or unoccupied, within the terms of the policy." It would not convey to an ordinary mind the idea that a house is vacant or unoccupied when it has an inhabitant who intends to remain in it as his residence, and who has left it for a temporary purpose. If the phrases were used in their strict legal sense no one would imagine that the tenant was not such an occupant as would be liable to the responsibilities attached by law to occupants, or that there was such a vacancy of possession as would suspend possessory rights. It would be burglary to feloniously break and enter the house, and arson to maliciously burn it. There may be less occasion to care for a house in which no one lives, than for one tenanted, but a person temporarily absent will usually take some pains to have his premises kept under oversight, and in the present case such provision was made for the domestic animals, as well as for the house itself. It would be regarded as singular doctrine to hold that families, leaving their houses on excursions or other temporary occasions, cease to occupy them. In *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 280; s. c., 23 Am. Rep. 111, it was held that a removal by a son and his family to his father's house, in the neighborhood of his own, to remain with his mother in his father's house while she needed their company, but with the intention of returning to his own house, which was not dismantled, was not a vacating by removal of the son's house, although the absence actually continued about three months. It was also held in *Whitney v. Black River Ins. Co.*, 72 N. Y. 118; s. c., 28 Am. Rep. 116, that a saw-mill, lying idle for several weeks for lack of water or logs, did not thereby cease to be occupied during the intervals, and in discussing the meaning of the terms reference was made to a school-house in vacation as not ceasing to be occupied for school purposes.

The case of a school-house, mentioned above, was decided in *American Ins. Co. v. Foster*, 52 Ill. 334; s. c., 34 Am. Rep. 134. See, also, *McClure v. Watertown F. Ins. Co.*, post.

In *Herrman v. Merchants' Ins. Co.*, New York Superior Court, 1879, the policy provided: "If the premises shall become vacant and unoccupied except as herein specially provided for, or hereafter agreed to by this corporation in writing upon this policy, from thenceforth this policy shall be void and of no force or effect." The house was used as a summer residence of the plaintiff and his family. In the autumn the property was left in charge of plaintiff's farmer, who, with his family, resided in a frame dwelling, also covered by the policy, and who were permitted to live in the main dwelling-house if they had not sufficient room in their own. The plaintiff left the house furnished. The farmer regularly went into the dwelling-house, opened, aired and secured it, and used, watched and guarded it and the other buildings and property, and it was in sight from his own dwelling. The plaintiff intended to return to the house as his summer residence. Held, that two separate facts—vacancy and absence of occupation—must occur, and that, too, jointly, so as to be in existence at the same time, and that they did not exist, and the policy was not avoided.

In *Danison v. Phoenix Ins. Co.*, 52 Iowa, 457, a tenant had moved out without the knowledge of the landlord, and the building was unoccupied seventeen days. Held, that the policy was void. And so of a vacancy of four days, in *Atina Ins. Co. v. Meyer*, 68 Ind. 226.

GROVER & BAKER SEWING MACHINE COMPANY V. MISSOURI
PACIFIC RAILWAY COMPANY.

(70 Mo. 672.)

Carrier — contract beyond terminus — station agent.

A common carrier is not bound by a contract by a station agent for transportation of goods to a point beyond his own line, unless such agent has express authority, or authority may be implied from previous dealings of the parties, or the carrier holds himself out as a common carrier to such point.

ACTION of damages for loss of goods. The opinion states the facts. The plaintiff had judgment below.

Thos. J. Portis and E. A. Andrews, for appellant.

Bryant & Holmes, for respondent.

HENRY, J. This was an action in the Jackson special law and equity court, to recover of defendant damages for the loss of a sewing machine shipped over its road from Kansas City to Osceola, Mo., to one James N. Thompson. The answer alleged that Osceola is not on the line of defendant's road, and that defendant made no contract to transport the sewing machine to that point. There was a judgment for plaintiff from which defendant has appealed.

The evidence shows that defendant was operating a road from Kansas City to St. Louis, which, at Sedalia, Mo., connects with the Missouri, Kansas & Texas Railroad running south from that point, beyond the town of Clinton, which is a station on said road and the shipping point for Osceola, twenty-seven miles distant from Clinton, and neither the defendant nor the Missouri, Kansas & Texas Railroad was shown to be a common carrier between Clinton and Osceola, nor was there any railroad between those two points, nor was it shown that there was any common carrier between those points. It was agreed that Joseph M. Lee would testify, if present, that he was, at the time of the execution of the receipt given for said machine, defendant's freight agent at Kansas City, and had general authority to act as defendant's freight agent at Kansas City, but that the rules of the company did not permit him to enter into any contract for transportation of freight beyond the terminus of defendant's line

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of railroad without special permission from defendant's general freight agent at St. Louis. It was expressly agreed that said Lee was the freight agent of defendant at Kansas City, and by his duly authorized clerk, Leonard, executed and delivered to plaintiff the following receipt:

KANSAS CITY, Mo., March 7th, 1872.

Received of Grover & Baker Sewing Machine Company, in good order, by Missouri Pacific Railroad Company, to be delivered in like good order unto James M. Thompson, Osceola, Missouri.

| Marks. | Articles. | Weight. |
|----------------|------------------------------|----------|
| J M. Thompson, | box and frame containing one | 100 lbs. |
| Osceola, Mo. | sewing machine. | |
| (Signed.) | J. M. LEE, Agent, L. | |

The box and crate containing the machine reached the town of Clinton, and there the crate containing the machine frame and a certain box were delivered to Jacob Blinckenhoff, to be delivered to said Thompson at Osceola. Upon the delivery of said box to said Thompson, it proved to be a box containing leather and shoe-findings, shipped to him from St. Louis, and the machinery of said sewing machine was never delivered to said Thompson or to plaintiff. The receipt sued on was furnished, filled out and presented to said clerk of Lee, by plaintiff for signature. It was not shown that plaintiff had ever before shipped over said road sewing machines, or other goods to be delivered at Osceola, or that the defendant had ever held itself out as carrier of goods to that point. On this state of facts, was plaintiff entitled to recover?

That a railroad may, by contract, subject itself to the obligation of a common carrier beyond its own line, is well settled by the weight of authority, but as was said in *R. R. v. Pratt*, 22 Wall. 124, the result of American authorities limits the carrier's liability as such to his own line, when no special contract is made. In *Perkins v. P. S. & P. R. R. Co.*, 47 Me. 593, it was held that "a railroad may be bound by special contract, but not otherwise, to transport persons or property beyond the line of its own road." This remark was criticised in *Lock Co. v. Railroad*, 48 N. H. 355; s. c., 22 Am. Rep. 342, in which we think it was shown "that the term 'express contract' could hardly have been used in its strict sense, to signify a contract in the form of a direct promise or undertaking, in language, oral or written, proper to show a positive agreement, since

the judge who delivered the opinion of the court speaks of a case where the carriers would be liable on the ground that they held themselves out as common carriers to that place; in which case (remarks the judge in the New Hampshire case), as I understand it, the contract would not be express in the strict or usual sense of the term, but implied from the conduct of the party." Taking the criticism as just, the doctrine may be stated, that a railroad company may be bound by contract, express or implied, but not otherwise, to transport persons or property beyond the line of its own road. As thus declared, it is fully sustained by the authorities, both in the United States and England.

The vital question therefore in the case is, whether the defendant's freight agent at Kansas City had authority to make the contract sued on, and in this case that is to be determined by ascertaining whether or not the power to make the contract was within the general scope of the agent's apparent authority. If it was, then although the regulations of the company forbade him from making such a contract, unless plaintiff was aware of such regulations, the company is bound. Here the agent was forbidden to make such contracts, but there is no evidence tending to show that plaintiff was informed of such regulations. The whole question then depends upon the character of Lee's agency, whether it was general or special.

There is a marked distinction between special and general agents, with respect to the authority to bind the principal. The principal is bound by the act of the general agent though such acts are in violation of the agent's instructions; while the principal is not bound by the unauthorized acts of a special agent. Story on Agency, § 1720. Smith in his Mercantile Law, page 59, thus states the doctrine: "The authority of a general agent to perform all things usual in the line of business in which he is employed, cannot be limited by any private order or directions not known to the party dealing with him." The agreed statement does not show that Lee was a general freight agent of defendant, but is only to the effect that the testimony would show that the contract sued on was executed by Lee, then the freight agent of defendant's road at Kansas City, and the testimony of Lee was, that he was then freight agent of defendant at Kansas City, that he had general authority to act as defendant's freight agent at that point, but that the rules and regulations of the company did not permit him to enter into

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any contract for the transportation of freight beyond the terminus of defendant's road, without special permission from the defendant's general freight agent at St. Louis, and that he did not have at that time such special permission. In *Wait v. Albany and Susquehanna R. R. Co.*, 5 Lans. 477, the court held, that "strictly speaking, the business of a carrier, such as defendant, is confined to its own line, and the general scope of its subordinate agents' authority must be limited to its business." Some of the cases deny even to a general agent authority to bind the company by a contract to transport goods beyond its own line, unless expressly authorized to do so. But the doctrine announced by SUTHERLAND, J., in his dissenting opinion in the case of *Burtis v. Buffalo & State Line R. R. Co.*, 24 N.Y. 274, we think the better doctrine, viz.: that if defendant had the power to make or to authorize the making of such contract, then the person acting as the general freight agent should be deemed to have been clothed with all the power to make contracts for freight or in respect to the carrying and delivery of freight, that the principal had. But here there was no proof whatever that Lee was the defendant's general freight agent. The evidence for plaintiff only proved him a station agent, and Lee's testimony was that he was subordinate to a general freight agent at St. Louis, and by that agent was expressly forbidden to make such a contract. No course of dealing between plaintiff and the company's agent at Kansas City was shown from which the authority of the agent to make the contract might be inferred. It was not shown that the company had held itself out as a carrier of goods between Kansas City and Osceola. The naked question is presented, whether a local freight agent can make a contract for the company not only unauthorized, but expressly forbidden, for the transportation of goods beyond its line. We think that the company is not bound by such a contract made by the agent. In *Railroad Co. v. Pratt*, *supra*, there was evidence that Graves, the station agent, had authority to make the contract, and that for five years he had been the company's agent at Pottsdam, and that the plaintiff had been in the habit of transporting horses over the defendant's railroad to Boston, a point neither a terminus nor on the line of the road. The court held that "the power in a railroad corporation to make contracts to carry beyond its line, is coincident with the power to make contracts for transportation with other carriers, and is confined to the governing officer of the corporation, and that its subordinate agents

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do not possess that power unless it has been expressly conferred upon them or has been so exercised by those who exercise the general authority as to have become the established business of the road."

In *Burroughs v. Norwich & Worcester R. R. Co.*, 100 Mass. 26: s. c., 1 Am. Rep. 78, the plaintiffs relied upon a receipt signed and delivered to them by the defendant's station agent at North Oxford, by the terms of which the defendant "promised to forward and deliver the goods to the order of Trumbull, Slade & Co., New York." The station agent had been accustomed to give to the plaintiffs precisely similar receipts for goods delivered by them to the defendant at North Oxford to be transported, but the blank forms of these receipts were furnished by plaintiffs themselves, and the officers of the defendant corporation did not know that such receipts were given by the station agent, and receipts supplied by those officers to the station agent, and which they were accustomed to fill up and deliver when requested, for goods to be transported to New York were of a different form, stipulating that the goods should be transported by defendant to New London, and thence by steamboat of the Norwich & New York Transportation Co. to New York, and that in case loss or damage should be incurred, the company should be responsible therefor in whose actual custody the goods might be when such loss or damage occurred. The station agent at North Oxford was the proper person to receive and sign receipts for goods delivered at that station, but had no other authority to sign and deliver to plaintiff the receipt relied upon, than was to be implied from the above facts. The court held that these facts were "clearly insufficient to warrant a court or jury in inferring that he had authority to bind defendant as common carriers beyond the line of their own railroad." That case is directly in point, but it is not necessary for this court to adopt so stringent a rule as was there announced in order to determine against plaintiff the question of the authority of the agent Lee, to make the contract relied upon in this case. There were several facts there from which authority in the agent might have been inferred, that are not in this case, which only presents, as before stated, the naked question whether or not the defendant is bound by such a contract as Lee signed for the company without express authority to do so, and against the explicit directions to the contrary from his superior officer, the general freight agent, there having been no previous dealings between

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the plaintiff and the company from which plaintiff might reasonably have inferred such authority, and the company not having held itself out as a common carrier to a point beyond its line of road. On such a state of facts there can be no doubt that the company is not liable on the contract made by the agent. The court below, by its first instruction for plaintiff, left it to the jury on the above facts to determine whether the agent Lee had authority to make the contract with plaintiff or not. It should have declared as a matter of law, that on said facts plaintiff could not recover, or given the second instruction of those asked by defendant, "that the contract sued on as a contract of defendant to carry to the town of Osceola is void."

Judgment reversed and cause remanded.

All concur except HUGH, J., who having been of counsel, did not sit in the case.

CASES
IN THE
SUPREME COURT
OF
MONTANA TERRITORY.

HIGLEY V. GILMER.

(8 Mont. 90.)

Carrier — passenger — trespasser.

A common carrier of passengers is bound to exercise only ordinary care toward trespassers and persons refusing to pay fare. (*See note, p. 458.*)

ACTION for personal injuries by the upsetting of defendant's stage coach. The opinion states the facts. The plaintiff had judgment below.

E. W. Toole and Sanders & Cullen, for appellants.

Chumasero & Chadwick and Shoher & Lowry, for respondent.

KNOWLES, J. [Omitting minor matters.] I come now to consider the most important and vital point in this case. The appellants, in answer to respondent's complaint, made the following denial and allegations, which upon motion were stricken out by the court and duly excepted to by appellants, viz.:

"That the said Higley was received as a passenger on their said

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coach as in the said complaint is alleged, but say that from the city of Jefferson to the said town of Helena the said plaintiff was wrongfully thereon and contrary to the request and command of these defendants by their agents, who then and there having been refused upon his request therefor, the fare of the said Higley on said coach, did not consent or agree to his becoming a passenger of defendants thereon, but forbade him so to continue thereon and did not consent thereto."

Upon the trial the appellant offered to prove the above facts, and in addition thereto that the respondent declared in effect his intention to resist an expulsion from the coach with force. The reasons that induced the court below to make the above ruling are presented to us in his written opinion. He held that it made no difference as to whether the respondent had paid his fare when requested or not; as to whether or not he was on the coach with the express consent of the appellants. That if they did not expel him from their coach, and if necessary use sufficient force to accomplish this, in effect respondent was a passenger whom appellants undertook to carry, and entitled to the same care as any other passenger on their conveyance.

There has been but one authority cited that in my opinion fully supports this doctrine. Whart. on Neg., § 354. As far as my investigations have proceeded I have been unable to find another authority that fully supports this view. That author evidently attempts to support this doctrine, as will be seen by a note to the above paragraph, by the rule that one trespass will not justify another. A carrier of passengers cannot be said to be guilty of a trespass until he has violated some duty or been guilty of negligence. This is undoubtedly a correct rule but does not meet a case like this. Can it be said that because the appellants did not expel respondent from their coach by force, therefore they consented to his becoming a passenger thereon? A person who enters into the coach of a common carrier of passengers without any lawful right, or remains there after he has no lawful right to remain, and has been ordered to leave the same, certainly ought to be considered a trespasser as much as any one would be who enters the house of another unlawfully, or who remains there after he has been ordered by the proprietor to leave. Would any court hold that where a party had made a forcible entry upon the property of another, that because the owner thereof had not expelled him by force, therefore he had

licensed or consented to his entry? Could any one hold, in case half a dozen highwaymen should enter the coach of appellants, remote from the settlements, without the consent of any agents thereof, and against the protest of their agents, and compel the driver to haul them fifty miles along the road, and neither the driver, nor any agents of the company, thought it even prudent to attempt to expel them from the coach, that therefore appellants consented to their occupancy of the coach and that thereby they became passengers? A person who enters the coach of a common carrier of passengers without any intention to pay his fare if the same is demanded, or who refuses to pay the same when it is demanded, is not lawfully in the coach. Any intermeddling with the personal property of another without his consent, express or implied, is a trespass. *Gilbert v. Nagle*, 118 Mass. 278.

Who is a passenger? "A passenger is a person who undertakes with consent of the carrier to travel in the conveyance provided by the latter, otherwise than in the service of the carrier as such. Any fact indicating on the one side an offer to carry, or to be carried, and on the other side an acceptance of such offer or request are sufficient. * * * The question whether one is a passenger or not is one of mixed law and fact, but the law being tolerably clear, it may be said as a general rule that the issue upon any conflict of evidence is one for a jury to decide and not one to be passed upon as a matter of law, by the court. *Shearm. & Redf. on Neg.*, 305-6, § 262.

"While it is the duty of a common carrier of passengers to carry any person who may apply for passage, if he be a suitable person and the carrier has sufficient room in his conveyance, it is nevertheless true that this obligation is subject to the qualification that the regular fare be paid or tendered." *Angell on Carriers* (Lathrop's ed.), 437, § 525.

Before a person can become a passenger, he must offer to become one, and this offer must be accepted by the carrier, and unless the fare is waived it must be paid or tendered.

Many cases treat the relation of carrier and passenger as formed by contract. Now if a person proposes to become a passenger and yet refuses to pay his fare, whereupon the carrier refuses to undertake to carry him, how can there be said to be a contract of carriage between them? There is no mutuality in such a contract. The minds of the parties do not meet. Again, consider that the duties

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of a carrier are fixed by law and not by contract, then these duties are not required to be performed, unless the person who demands their fulfillment pays his fare or tenders to pay the same or the payment is waived. Until that requirement is complied with, the carrier does not undertake to perform the duty of carrying him. Many cases might be cited to show that when a person enters into the conveyance of a common carrier of passengers, and if it is demanded, refuses to pay the regular fare, he can be expelled therefrom by force. These cases are based upon the view that such a person has no right in the conveyance of such carrier; that in fact he is a trespasser there. If a person with great assurance enters a railroad car and takes the best seat therein and refuses to pay his fare when demanded, is he any less a trespasser than some poor, timid boy who gets upon a train and hides under the seats or in some nook in a baggage-car, without any intention of paying any fare? If so, I am unable to perceive it.

If the person I have named, upon the refusal to pay his fare, should be ordered to leave the car and given due opportunity therefor, but should refuse flatly to go, and the conductor should not deem it prudent to attempt to expel him on account of his known strength and fierce passions, I should think it would tax to its utmost the ingenuity of even so learned and competent an author as Mr. Wharton to find that the railroad company had consented to his becoming a passenger on their conveyance.

The appellants should have been allowed to prove that respondent was not a passenger, but a trespasser, unless the fact that he was not a passenger, but a trespasser, would not vary the liability of appellants.

I am confident that the authorities will support me in holding that if a person is not a passenger, a carrier of passengers does not owe him that high degree of care that he would to a passenger. The law imposes that high degree of care upon a carrier of passengers, from the fact that he carries passengers for hire as a business.

In the case of *Lucas, Admr., v. Taunton & New Bedford R. R. Co.*, 6 Gray, 64, the court held that a person who entered a railroad car to assist to a seat an aged and infirm aunt, was not a passenger, and the railroad company was not bound to exercise toward her the extraordinary care due a passenger, but only ordinary care, a very different responsibility. In the case of *Lygo v. Newbold*, 9 Exch. 302, the plaintiff rode in the cart of defendant, without

defendant's authority, by permission of defendant's servant, with the goods he had contracted to carry for her. The cart, being insecure, broke down, and plaintiff was injured. The court held that the defendant was not liable for the injury, the plaintiff not being rightfully in that cart.

"Railway companies owe a higher degree of watchfulness and care to those sustaining the relation of passengers than to mere strangers having no fiduciary relations with the company. In the former case the utmost care and skill is required to avoid injuries, but in the latter case only such as skillful, prudent and discreet persons, having the management of such business in such a neighborhood, would naturally be expected to put forth. Redf. on Carriers and other Bailees, §§ 520-521. This rule was approved in the case of *State of Maryland v. Baltimore & Ohio R. R.*, 24 Md. 84. The above author in his work on Carriers and other Bailees, § 383, in commenting on the case of *St. Joseph R. R. Co. v. Higgins*, 36 Mo. 418, says: "One who had been in the employ of the company as an engineer and brakeman until his train was discontinued a few days previously, and who had not been settled with or discharged, although not actually under pay at the time, and who signaled the train to take him up, and who took his seat in the baggage car with the other employees of the company and paid no fare, and was not expected to, although at the time in pursuit of other employment, cannot be considered a passenger. If he would secure the immunities and rights of a passenger he should have paid his fare and taken his seat in the passenger car." Again in a note, page 388 of the above work, he says, in speaking of a person travelling on a railroad, as though he was an employee thereof: "And if he claims the privilege and it is acceded to by the officers of the company, there is great injustice in allowing the person at the same time to hold the company to the higher responsibility which it owes to passengers from whom it derives a revenue." There is another class of cases which illustrates the rule I contend for, viz., cases where a person takes a position on a train where he has no right to be. In the case in 22 Barb. 91, it was held that where a person insisted upon riding with the engineer upon the engine without paying any fare, and is informed that this is against the rules of the company, and was injured, it was held that the company was not liable because plaintiff was a wrong-doer. In the case of *Galena & Chicago Union R. R. v. Farwood*, 15 Ill. 468, a

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person was received as a passenger in the baggage car but did not remain there, but went into another car, where an accident occurred and he was hurt, it was held that the company was not liable, evidently upon the ground that the passenger had no right in the other car.

Another class of cases may be cited also to show that the care a common carrier owes to passengers is greater than to those not passengers. When a common carrier strikes and injures a person in the street or upon a crossing of a street or upon a railroad track, he is liable for only ordinary care. *O. C. & C. R. R. Co. v. Jacob Twry*, 8 Ohio, 570; *Bland v. Schenectady & Troy R. R. Co.*, 8 Barb. 368; *Evansville & Crawfordsville R. R. Co. v. Hyatt*, 17 Ind. 102. A case reported in 85 Ill. 80; s. c., 28 Am. Rep. 613, announces a principle that meets this case. It is the case of *T. W. & W. R. R. Co. v. Beggs*, and the opinion is delivered by BREES, J., one of the most learned of the Supreme Court judges of the State of Illinois. He held as follows:

"Where one is riding on a free pass, not transferable, issued to another person, and is injured, he is not to be regarded as a passenger in the true sense of that term, and the company can only be held liable for such gross negligence as amounts to willful injury."

The authorities cited by respondent, save Wharton on Negligence, do not support his view. The case of *Columbus, Chicago & Indiana C. R. R. Co. v. Powell*, 40 Ind. 37, cannot be considered a strong case for respondent. The court held that the defendant in that case was a passenger and not a trespasser, upon the ground that the company could have collected fare of him. There was no demand for fare and no refusal to pay. But that court was not fully satisfied with its conclusion that defendant was a passenger, but said that if they were mistaken on that point the railroad company was under obligation to use some diligence and care in putting the defendant off the train. In this case an old and infirm man had by mistake got upon a wrong train, and when he found out his mistake asked to be put off the train and told the conductor of his infirmities. The facts show that the jury would have been warranted in finding that the railroad company had not exercised ordinary care in putting him off the train, and ordinary care is not the care required of passenger carriers toward passengers.

The case of *The Phil. & Reading R. R. Co. v. Derby*, 14 How. 483, was one where there was no doubt that the railroad company

had undertaken to carry Derby as a passenger, but they sought to avoid liability from the fact that he had not paid any fare. Derby was rightfully upon the car, and yet the railroad company was held in that case only for gross negligence because of the non-payment of fare. That was the ground upon which the plaintiff was held liable in the court below, and the judgment was affirmed in the Supreme Court. To support his decision, Justice GRIER refers to the case of *Coggs v. Bernard*, 1 Smith's Lead. Cas. (Howard and Wallace's Notes), 346. In this case it was held that a gratuitous carrier of goods was liable for neglect. If there had been a consideration for the carriage, the carrier would have been liable as an insurer. It is evident, therefore, in that case, that Justice GRIER did not decide that a passenger carried gratuitously was entitled to the same care as a passenger for hire, although he thought that any thing that amounted to negligence might be called gross negligence under the circumstances. The case of *Wilton v. Middlesex R. R. Co.*, 107 Mass. 108, 8 C., 9 Am. Rep. 11, was one in which the court especially held that the plaintiff was not a trespasser, but was rightfully on the car, and the facts certainly warranted such a finding. It is intimated in this case, however, that if the plaintiff had been unlawfully on the car, or there had been any collusion between her and the driver to defraud the company out of the fare, she would not be entitled to recover.

In the case of *Nolton v. Western R. R. Corporation*, 15 N. Y. 444, the court found that the railroad company had undertaken to carry Nolton, although he paid no fare, and the facts show conclusively that he was rightfully upon defendant's cars. I think whatever may be said about this case, one thing is certain, and that is, that the court did not hold, in deciding it, that the defendant, as a common carrier, was liable for that high degree of care due a passenger for hire. In this case Justice SELDEN says: "The duty arises in such cases, I apprehend, entirely independent of any contract express or implied. The principle upon which any party is held responsible for its violation does not differ essentially in its nature from that which imposes a liability upon the owner of a dangerous animal, who carelessly suffers such animal to run at large, by means of which another receives injury." And further on in the same opinion he says, the basis of the liability is, "culpable negligence of the party." This is not the basis of the liability of a common carrier of passengers. Hill. on Torts, 160, is

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authority for the rule that one trespass will not justify another, but it is no authority for the proposition that a common carrier owes the same degree of care to a trespasser as he does to a passenger for hire. The case of *Daley v. Norwich & Western R. R. Co.*, 26 Conn. 591, is not in point to prove that a carrier is bound to observe the same degree of care toward a trespasser as toward a passenger, but the contrary is true, for in that case the carrier was held liable only for ordinary care.

The case of *Brown v. Lynn*, 31 Penn. St. 510, is a case which in no way touches the liability of a common carrier. It was a case where a trespass was committed upon a trespasser. It is no more in point than a case would be, where one man, resisting a trespass committed by another, uses more force than is necessary and thus becomes a trespasser himself.

I believe I have now considered the principal cases cited by respondent upon this point, and they certainly do not maintain the doctrine that a trespasser upon the coach of a common carrier is entitled to the same care, skill and prudence as a passenger for hire. If the respondent was a trespasser, appellants were bound not to willfully injure him, for that would be attempting to justify one trespass by another. If he were a trespasser, appellants would be bound probably to exercise toward him ordinary care and no more. The court therefore erred in striking out the portion of appellants' answer above referred to. They should have been allowed to prove that respondent was a trespasser upon their coach and not a passenger, for the reason that such fact lessened their obligation to him.

[Omitting minor considerations.]

Upon the theory on which the court tried this cause the instructions given were pertinent to the issue presented, and proper, and covered the ground presented in this case fully and fairly. The case, however, was tried upon the theory that it made no difference as to whether the respondent was a passenger or a trespasser in regard to the liability of appellants. For this reason a portion of appellants' answer was stricken out, and this was error, and for this the judgment of the court below is reversed, and the order striking out a portion of appellants' answer and the cause remanded for a new trial.

Judgment reversed.

WADE, C. J., dissenting. It is evident from an inspection of the record that this case was tried upon the theory that as the defend-

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ants had the undoubted right and authority to put any person off their coach who refused to pay his fare, therefore, so long as they permitted such person to remain thereon, he was by their consent a passenger to all intents and purposes, and entitled to the same degree of care as any other passenger, and I am not yet convinced that this theory is incorrect.

NOTE BY THE REPORTER.—See *Houston & Tex. Cent. Ry. Co. v. Moore*, 49 Tex. 31; s. c., 30 Am. Rep. 98; *Com. v. Pl. & Mass. R. R. Co.*, 108 Mass. 7; s. c., 11 Am. Rep. 301; *Union Pac. Ry. Co. v. Nichols*, 8 Kans. 505; s. c., 12 Am. Rep. 475. In *Penn. R. Co. v. Erie*, Penn. Sup. Ct. (June, 1861), it was held that a route or mail agent, in the employ of the government, while travelling on a railway train in discharge of his duties, is not a "passenger." But contra, *Hammond v. North-Eastern Ry. Co.*, 6 S. C. 120; s. c., 24 Am. Rep. 497; *Blair v. Erie Ry. Co.*, 66 N. Y. 513; s. c., 28 Am. Rep. 55.

BANK OF DEER LODGE V. HOPE MINING COMPANY.

(3 Mont. 143.)

Agency — to draw bill — strictly construed — estoppel.

An agent authorized to draw a bill of exchange in his own name cannot draw in the name of his principal, and the principal is not estopped from refusing payment by his previous payment of a similar bill.

ACTION on a bill of exchange. The opinion states the case. The defendant had judgment below.

Sharp & Napton, for appellant.

W. W. Dixon, for respondent.

BLAKE, J. The appellant brings this action to recover upon the following bill of exchange:

"\$1,000.00. DEER LODGE, M. T., May 18th, 1874.

At sight, pay to the order of the First National Bank, Deer Lodge, one thousand dollars. Value received, and charge the same to account of

To CHAS. C. WHITTLESBY, Prest.

HOPE MINING Co.
By JOS. M. ALGER.

Hope Mining Co.,
St. Louis, Mo."

{ Stamp }

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Indorsement—"Pay the Security Bank, or order for collection, account of First National Bank, Deer Lodge, Montana.

W. A. CLARK, *President*.

The appellant has been incorporated under the laws of the United States, and is engaged in a general banking business. It discounted the bill upon its date and paid the proceeds to Alger. The respondent has been incorporated under the laws of the State of Missouri, and is mining some quartz lodes at Phillipsburg and has an office in St. Louis, Missouri. The appellant demanded payment of the bill at the office in St. Louis, May 27, 1874, and the respondent refused to accept or pay the same. Notice of its presentment and non-payment was properly given.

The respondent denied that Alger was its agent and claimed that he had no authority to draw the bill. The court below rendered judgment for the respondent upon these grounds, and also found that it was the custom of the respondent in drawing drafts upon itself to direct them to Chas. C. Whittlesey, president of the Hope Mining Company. The only authority of Alger to draw the bill is contained in the following telegram which was transmitted by the Western Union Telegraph Company.

"Dated ST. LOUIS, Feb. 23d, 1874.

Received at _____.

To JOSEPH ALGER, Phillipsburg:

Care for company's property. See that McArdle has what he needs. If funds needed, draw on company.

CHAS. C. WHITTLESEY."

This telegram was received by Alger about February 25, 1874, after the death of McArdle. One bill of exchange for \$500 was drawn by Alger, March 26, 1874, which was discounted by the appellant, and afterward accepted and paid by the respondent. The proceeds were expended for the benefit of the respondent. This bill was signed in the same manner as that involved in this action, and all the parties were the same. No other bills were drawn on the respondent by Alger, but during the months of February, March and April, 1874, Alger checked against some funds of the respondent in Deer Lodge and Helena. Alger was not in the employ of the respondent when the second bill was drawn, and the proceeds were used in defraying the expenses of Mrs. McArdle and

her family from Phillipsburg to St. Louis. The officers of the appellant did not make any inquiries respecting the authority of Alger to sign these bills, or the purposes for which they were drawn, and never saw the telegram.

We must consider the relations of Alger and the respondent which affect the rights of the appellant. It is evident that the telegram authorized Alger to draw upon the respondent for money for certain objects. Did it constitute Alger the agent of the respondent, and empower him to sign the bill in that capacity? Did the officers of the respondent authorize those of the appellant, with whom Alger dealt, to believe as fair and reasonable men that this authority had been actually given to Alger? An examination of the law of agency will enable us to determine these questions, and if we find that either of them should be answered in the affirmative, we must decide that the respondent was bound by the acts of Alger. 1 Pars. on Notes and Bills, 100, 101, and cases there cited.

Some of the principles, which are applicable to these questions, have been announced by this court in the case of *Herbert v. King*, 1 Mon. 475. It was held that the principal is responsible for the acts of his agent, when they have been done within the scope of his authority, and that "courts will not tolerate any enlargement of this liability." The bill shows that Alger claimed to be the agent of the respondent, and it was the duty of the officers of the appellant to ascertain the extent of his power before they discounted it. In *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 3 N. Y. 631, Comstock, J., says: "Whoever proposes to deal with a security of any kind, appearing on its face to be given by one man for another, is bound to inquire whether it has been given by due authority, and if he omits that inquiry, he deals at his peril." *Blum v. Robertson*, 24 Cal. 140, and cases there cited. In this action, the burden of proving that Alger was the agent of the respondent in drawing the bill is on the appellant. Add. on Cont., § 57. The power of an agent to make the principal a party to negotiable paper is always restricted by the courts. "So carefully is this authority watched, that where power is given to do some things with regard to promissory notes or bills, it cannot be enlarged by construction to do other, though somewhat similar, things." 1 Pars. on Notes and Bills, 107.

This doctrine may be illustrated by the following authorities: An agent who is authorized to draw and indorse bills of exchange

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in the name of his principal has no power to draw or indorse the bills in his own name, or in the joint name of himself and his principal. *Stainback v. Read*, 11 Gratt. 281. The agent of a corporation who was authorized to borrow money from a bank and execute the note of the corporation therefor, could not bind his principal by borrowing the money and executing a bond for the same under the seal of the corporation. *Little Rock v. State Bank*, 3 Ark. 227; Story on Agency (7th ed.), § 165. An authority to draw is not an authority to indorse or accept bills. 1 Para. on Notes and Bills, 107, and cases there cited. In *Tate v. Evans*, 7 Mo. 419, the agent was authorized November 28, 1839, to draw a bill of exchange "at four months' date," and the bill was actually drawn December 23, 1839, and ante-dated November 28, 1839, and payable "four months after date." The court held that the bill was not in conformity to the authority conferred on the drawer and that the principal was not bound.

The authority of Alger to draw checks on the money of the respondent in this Territory is wholly distinct from that of drawing a bill of exchange on the respondent in Missouri. The power to exercise one of these acts does not include the other, and the fact that Alger checked against the funds of the respondent during the time which has been mentioned does not tend to prove that he had the authority to draw the bill in controversy.

The appellant maintains that the facts which have been referred to would authorize the officers of the appellant, as fair and reasonable men, in believing that Alger had the right to draw the bill. In other words, the argument is that the respondent is estopped from disputing that Alger had the authority he exercised respecting the bill. The officers of the appellant made no effort to ascertain the power of Alger, and appear to have assumed that the payment of the first bill by the respondent was a sufficient recognition of the authority of Alger in drawing the second bill. If Alger had repeatedly performed acts like the one in dispute, which had been ratified by the respondent, the officers of the appellant could presume that he was authorized to draw the bill. But this conclusion could not be inferred from one instance of such recognition. The legal effect of the ratification of an unauthorized act is equivalent to the previous delegation of authority to do the act. This ratification, however, does not operate as presumptive evidence of original authority, but as a confirmation *per se* of the unauthorized

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act. *Commercial Bank v. Warren*, 15 N. Y. 577. In *Cook v. Baldwin*, 120 Mass. 317; s. c., 21 Am. Rep. 517, the court held that the part payment by the drawee of a bill of exchange is not such a recognition of his obligation as will as matter of law bind him to pay the remainder.

We are now brought to the consideration of the telegram from Whittlesey to Alger, and the rights of the parties to the action must depend upon its interpretation. What is the character of the instrument which Alger signed? It is a bill drawn by the agent of a corporation upon itself, and may be treated as an accepted bill or a promissory note at the election of the holder. 1 Pars. on Notes and Bills, 62, 288, and cases there cited; 2 Greenl. Ev., § 160, and cases there cited. Alger had no authority to make such a bill or note; he was a special agent, and his power was accurately limited. The telegram did not describe or recognize Alger as an agent of the respondent, but authorized him to draw in his own name on the respondent if money was needed for a particular purpose. It is not necessary for us to pursue this inquiry into the effect of the acts of Alger on the rights of all the parties to the bill. Alger violated his instructions and the respondent is not bound by his action in drawing the bill.

The purchaser of the bill should have exercised prudence and examined the telegram to see whether it justified the act of Alger. "And if, from his omission to call for or to examine the instrument, he should encounter a loss from the defective authority of the agent, it is properly attributable to his own fault, since he must know that he has no other security than his reliance upon the good faith and credit of the agent." Story on Agency (7th ed.), § 72, and cases there cited.

The judgment is affirmed.

Judgment affirmed.

 COMMISSIONERS OF JEFFERSON COUNTY V. LINEBERGER.

(3 Mont. 281.)

Office and officer — liability of county treasurer for trust moneys stolen.

A county treasurer is liable on his official bond for trust moneys stolen from the safe provided by the county, without any want of care on his part.*

* Compare *Ward v. School District*, post.

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ACTION on a county treasurer's bond, conditioned to pay over the trust moneys according to law. The opinion states the point. The plaintiff had judgment below.

E. W. Tbole, for appellants.

James G. Spratt, for respondent.

WADE, C. J. [Omitting other matters.] It is alleged in the answer as a defense to the action that the plaintiffs, the county commissioners, provided the treasurer with an office and safe wherein to keep the funds coming into his hands, and that without any want of reasonable care on the part of the treasurer, his office was broken open, the safe therein robbed, and the money in question stolen. This defense was stricken out on motion, and this action of the court is assigned as error. Was the matter stricken from the answer a defense to the question? This question is so completely answered by the Supreme Court of the United States in the case of *United States v. Prescott*, 3 How. 578, that we quote at length from the opinion therein. The action was brought on a bond given by Prescott, with the other defendants as his sureties, for the faithful performance of the duties of receiver of public moneys at Chicago, in the State of Illinois. The defense was that Prescott failed to pay over the money for which the action was brought, because the same had been feloniously stolen, taken and carried away from his possession without any fault or negligence on his part, and that he used ordinary care and diligence in keeping the money. The court, by McLEAN, J., says: "This is not a case of bailment, and consequently the law of bailment does not apply to it. The liability of the defendant Prescott arises out of his official bond, and principles which are founded upon public policy." After stating the conditions of the bond of Prescott which in effect are the same as those contained in the bond of Lineberger, viz., to pay as the law directs all moneys received by him as receiver of public moneys, the court continues: "The condition of the bond has been broken, as the defendant Prescott failed to pay over the money received by him when required to do so, and the question is, whether he shall be exonerated from the condition of his bond on the ground that the money had been stolen from him?" "The objection to this defense is, that it is not within

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the condition of the bond; and this would seem conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government; how then can Prescott be discharged from his bond? He knew the extent of his obligation when he entered into it, and he has realized the fruits of his obligation by the enjoyment of the office. Shall he be discharged from liability contrary to his own express undertaking? The obligation to keep safely the public moneys is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond." * * *

"Public policy requires that every depository of the public money should be held to strict accountability. Not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which come to his hands. Any relaxation of this condition would open a door to frauds which might be practiced with impunity. A depository would have nothing more to do than to lay his plans and arrange his proofs so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of customs, receivers of public money, and others who receive more or less of the public funds, and what losses might not be anticipated by the public! No such principle has been recognized or admitted as a legal defense. And it is believed that the instances are few, if indeed any can be found, where any relief has been given in such cases by the interposition of congress."

"As every depository receives the office with a full knowledge of its responsibilities, he cannot in case of loss complain of hardship. He must stand by his bond and meet the hazards which he voluntarily incurs."

If we should substitute the name of Lineberger, county treasurer, for that of Prescott, receiver of public moneys, the language and the reasoning of the foregoing decision would be equally applicable. The treasurer is not bailee of the county funds. His liability is fixed by the condition of his bond. His promise to pay over the money belonging to the county as the law directs is absolute, and the sureties on his bond guarantee this promise. Payment when required can alone discharge the bond. In the case of *Commonwealth v. Comley*, 3 Penn. 394, GIBSON, C. J., says: "The opinion of the court in the case of *United States v. Prescott*, *supra*, is founded in sound policy and sound law. The responsibility of a public

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receiver is determined not by the law of bailment which is called in to supply the place of a special agreement where there is none, but by the condition of the bond. The condition of it in this instance was to 'account for and pay over the moneys to be received; and we would look in vain for a power to relieve from the performance of it.' * * * A loss by a visitation of Providence, which no vigilance could prevent, would present a more meritorious claim to relief, one would be apt to think, than a loss by robbery, which is always preceded by a greater or less degree of negligence. A receiver or his surety would come before a chancellor with an ill grace on that ground, even if there was a power to relieve him. The keepers of the public moneys, or their sponsors, are to be held strictly to the contract, for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant. A chancellor is not bound to control the legal effect of a contract in any case, and his discretion, were he at liberty to use it, would be influenced by considerations of general policy."

To the same effect are the following cases: *Muzzy, Supervisor, v. Shattuck*, 1 Den. 233; *United States v. Dashiell*, 4 Wall. 185; *United States v. Morgan*, 11 How. 150; *United States v. Thomas*, 15 Wall. 338; *State v. Harper*, 6 Ohio St. 607.

The cases of *Dunlop v. Monroe*, 7 Cr. 242, and *Barlett v. Crozier*, 17 Johns. 439; 8 Am. Dec. 438, referred to by appellants, wherein the general principle of law is announced that whenever an individual has sustained an injury by the misfeasance or nonfeasance of an officer, who acts or omits to act contrary to his duty, the law affords redress, are not in point, and certainly are not in conflict with the decisions we have cited, which hold that payment alone can discharge the bond. And the fact that the commissioners of the county provided the treasurer with an office and a safe is wholly immaterial. He was not obliged to keep his money in the safe. He was only required to pay it over according to law, and where he kept it before such payment was not material to inquire. With a good office and the best of safes, we say, as did the court in the *Prescott* case, that a treasurer would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss without laches on his part, if such a defense were permitted.

[Omitting other matters.]

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

FRAZIER V. SYAS.

(20 Neb. 113.)

Exception — wife of absconding husband — head of family.

Where a husband absconds, and his wife continues to carry on his farm, she becomes the head of the family and may maintain his claim to property exempt from execution.

REPLEVIN. The opinion states the case. The plaintiff had judgment below.

John P. Mauls, for plaintiff in error.

R. B. Likes and *C. J. Dikworth*, for defendants in error.

MAXWELL, C. J. This is an action of replevin. It appears from the bill of exceptions that in October, 1877, one J. D. Syas resided with his family on his homestead in Fillmore county, and was actually engaged in the business of agriculture, and was possessed of the horses in dispute. It also appears that during said month he left his house, and has not since been heard from, and that at the

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time he left, the horses in question were the only ones he possessed. Soon after Syas had left, these horses were levied upon by the plaintiff in error by virtue of an execution issued on a judgment recovered in favor of one Pinney and against Syas. The defendant in error, who is the wife of J. D. Syas, continued to reside on the homestead, and brought an action of replevin and recovered the possession of the property, and on the trial of the cause judgment was rendered in her favor for a return of the property, and damages for withholding the same. The cause is brought into this court by petition in error.

It is clearly shown by the record that the defendant in error is a resident of this State, the head of a family, and at the time the property in question was levied upon was actually engaged in the business of agriculture, and that these horses were the only ones she possessed. Under these circumstances they were exempt.

Section 530 of the Code provides that "no property hereafter mentioned shall be liable to attachment, execution, or sale, on any final process issued from any court in this State, against any person being a resident of this State and the head of a family." And it also provides that "if the debtor be at the time actually engaged in the business of agriculture, in addition to the above enumerated articles, one yoke of oxen, or a pair of horses in lieu thereof." Gen. Stat. 618.

In the case of *Darby v. Weyrich*, 8 Neb. 174, it was held that the property which is exempt by law for the owner's debts is not susceptible of a fraudulent alienation.

Syas therefore had a perfect right to dispose of this property as he saw fit, as it was not liable for his debts. But even if the property was subject to levy and sale upon execution in case the family should abandon their residence in this State, still, as it is shown that the wife and family continue to reside here, the property was not liable. In case of the husband's death the property would not thereby become subject to sale upon execution; why, then, should such liability accrue in case of his absence? It is the evident intention of the law that the exempt property in the possession of the family shall remain exempt so long as the family continue to reside in the State. *Bonnell v. Dunn*, 29 N. J. L. 437.

As was said in *Bowker v. Collins*, 4 Neb. 496, the homestead law, being remedial in its character, should receive a liberal construction consistent with justice for the purpose of preserving a home for the

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unfortunate. And the same rule applies to the exemption of chattels. The law is for the benefit of the family of the debtor, and its benefits may be claimed by the actual head of such family then residing in the State, although the husband may have absconded.

The property in question not being subject to levy and sale upon execution, the judgment of the court below is affirmed.

Judgment affirmed.

LAUSMAN V. DRAHOS.

(10 Neb. 172.)

Landlord and tenant — tenant attempting to purchase landlord's title.

A tenant in possession cannot acquire title adverse to his absent landlord by purchase at a judicial sale.*

THE opinion states the case. The defendant had judgment below.

Uriah Bruner, for appellant.

R. F. Stevenson, for appellee.

MAXWELL, C. J. This case was before the court in 1879, and is reported in 8 Neb. 457. The plaintiff moves for a rehearing upon the ground that Sonnenschein was the tenant of the plaintiff at the time he purchased the property in question, and that therefore he could not acquire an adverse title as against his lessor. No stress was laid upon this point in the former argument of the case, nor is the petition framed for the particular purpose of seeking to redeem from Drahos and Sonnenschein, the particular object aimed at being to require Mrs. Parrat to exhaust the other mortgaged property before selling that purchased by the plaintiff subject to the decree of foreclosure. The petition is very long, with the exhibits covering sixty-four pages. Much of it could have been stricken out on motion, and thereby have made it more symmetrical. But notwithstanding the want of form in the petition, all the facts which are well pleaded therein, for the purposes of the action are admitted to be true.

*To same effect, *Davis v. Davis*, 88 N. C. 71. Compare *Wetzelbaum v. Carlett* (28 Kan. 709); 37 Am. Rep. 304.

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The petition alleges in substance that on or about the first day of October, 1877, the plaintiff rented said lot 6, in block 19, to the defendant Frederick Sonnenschein, who entered into possession of said premises as said tenant, and as such tenant continued in possession of the same until after the sale and confirmation thereof; that the plaintiff was absent from this State from the 15th of June, 1876, till about the 15th of January, 1878, and had no notice of said sale and confirmation thereof until a long time after the confirmation of the same; that said Drahos and Sonnenschein purchased said lot for the sum of \$452, although it was worth the sum of \$1,200 at that time, and is still of that value; and that they purchased said lot with the intention of defrauding the plaintiff; that they have been and are in possession of said premises, the rental value of which is about \$10 per month. There is no prayer in the petition to redeem this lot from Drahos and Sonnenschein, the prayer upon that matter being to have their title declared void; but there is a general prayer "for such other relief as equity and the nature of the case may require."

Drahos and Sonnenschein join in a general demurrer to the petition, so that if there is a cause of action stated against either the judgment must be reversed. *Dunn v. Gibson*, 9 Neb. 513.

As a general rule a tenant will not be permitted to deny the title of his landlord so long as the tenancy exists. But when the landlord's title has been extinguished in an action for rent by the lessor these facts may be shown as a defense. The relation of landlord and tenant can be created only by lease, either in writing or by parol. It is said that "there is a tenure between lessor and lessee for years, to which fealty is incident by theory of law as well as of privity of estate between them." 1 Wash. Real Property, 413; *Thrall v. Omaha Hotel Co.*, 5 Neb. 300. And where the relation of landlord and tenant has been established it attaches to any who take through or under the tenant as assignee.

In *Mattis v. Robinson*, 1 Neb. 3, one Mattis leased certain premises for one year, and after the expiration of the lease, but while holding over and while in possession of the premises acquired under the lease, he purchased a mortgage on the premises for one-half of its face value, and commenced an action of foreclosure, thereby attempting to divest the title of his lessors. The court say: "The policy of the law will not allow a tenant to be guilty of a breach of good faith in denying a title, by acknowledging and act-

ing under which he originally obtained and has been permitted to hold possession of the premises. The lessee obtaining possession is estopped from keeping the land in violation of the agreement under which it was acquired. The result of allowing a tenant to deny the title of his landlord is well illustrated in 2 Smith's Lead. Cas. 657. 'It is well known that a recovery cannot be had in ejectment without proof of title, and that it may be defeated by proving an outstanding title in a third person. For a tenant therefore to be permitted to question or contest his landlord's title in an action of ejectment for the land would be to take the estate from the latter and confer it upon the former whenever there was a defect, either in the title itself or the proof brought forward to sustain it. This would obviously be equally inconsistent with public policy and private faith, and would prevent men from letting their property even when they were unable to use it themselves.' Good faith requires that the tenant shall not avail himself of the advantage given by his possession as against his landlord. Before assailing his landlord's title he must put him in as good position as he was before the tenancy by delivering up to him the possession." This doctrine was reaffirmed in *Thrall v. Omaha Hotel Co.*, 5 Neb. 295.

Judge STORY says: "It may be laid down as a general rule that a trustee is bound not to do any thing which can place him in a position inconsistent with the interests of his trust, or which may have a tendency to interfere with his duty in discharging it. And this doctrine applies, not only to trustees strictly so called, but to others standing in a like situation, such as assignees and solicitors of a bankrupt estate. * * * It applies in like manner to executors and administrators * * *." Story's Eq. Jur., § 322. "There are many other cases of persons standing in regard to each other in like confidential relations in which similar principles apply. Among these may be enumerated the cases which arise from the relation of landlord and tenant, of partner and partner, principal and surety, and various others, where mutual agencies, rights, and duties are created between the parties by their own voluntary acts, or by operation of law." *Id.*, § 323.

To permit a tenant who has obtained possession under a lease to acquire an adverse title to the premises during the existence of the lease, and to set it up against his landlord, without first surrendering the possession thus acquired, would in many cases permit him to divest the title of his landlord. Suppose the title of the land-

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lord is possessory merely, can the tenant be permitted to divest this possessory title while his lease remains in force? We think not. In the case at bar the defendants purchased the premises during the existence of the lease without yielding possession of the premises, and without notice to their lessor. This being the case, it will be presumed that it was for the purpose of protecting the possession of the plaintiff. The petition therefore, upon *that* question, states a cause of action, for which the judgment of the District Court is reversed and the cause remanded for further proceedings.

Reversed and remanded.

McMILLAN v. MALLOY.

(10 Feb. 1880.)

Contract—breach of entire—recovery pro tanto.

On a contract to thresh an entire crop of wheat at a given price per acre, the employee, failing fully to perform, may recover at the contract price for what he has done, less the damages sustained by the employer by the breach of contract. (*See note, p. 476.*)

ACTION on contract. The opinion states the case. The plaintiff had judgment below.

E. F. Gray, for plaintiff in error, cited 7 Wait's Actions and Defenses, 358; *Harris v. Rathbon*, 2 Abb. 326; *Glacius v. Black*, 50 N. Y. 145; s. c., 10 Am. Rep. 449; *Smith v. Brady*, 17 N. Y. 173; *Allen v. Curles*, 6 Ohio St. 505; *Larkin v. Buck*, 11 id. 561; *Witherow v. Witherow*, 16 Ohio, 238; *Olmstead v. Beale*, 19 Pick. 528; *Miller v. Goddard*, 34 Me. 102; *Badgley v. Heald*, 4 Gillm. 64; *Hansell v. Erickson*, 28 id. 257; *Decamp v. Stevens*, 4 Blackf. 24; *Hayward v. Leonard*, 7 Pick. 180; 19 Am. Dec. 268; *Bishop v. Price*, 24 Wis. 480.

Reese & Gilkesson, for defendant in error.

MAXWELL, C. J. Malloy sued McMillan in the County Court of Saunders county, and recovered the sum of \$4.70 and costs.

McMillan appealed to the District Court, where judgment was rendered against him for the sum of \$30 and costs. He brings the cause into this court by petition in error. The petition of the plaintiff in the court below alleges: First, that there is a balance due him from the defendant of the sum of \$4.62 for threshing grain in 1876; second, that there is due him from the defendant the sum of \$40.08 for threshing wheat in 1878.

To this petition the defendant filed an answer in which he denied the facts stated in the first count of the petition; second, alleged that the threshing done in the year 1878 was performed under a contract between the plaintiff and defendant, that the plaintiff should thresh all the defendant's grain for that year at forty cents per acre, and that plaintiff threshed about one-third of said grain and refused to complete his contract, whereby the defendant was damaged in the sum of \$100; third, as a third defense the defendant alleged that the knuckles and joints of tumbling-rods of the threshing machine were not safely boxed and secured, as required by law.

It is evident from the record that the jury rejected the item of \$4.62, balance claimed to be due for threshing in 1876. It appears from the testimony that in the month of September, 1878, the plaintiff entered into a contract with the defendant to thresh his grain raised that year for the sum of forty cents per acre, and that in pursuance of said contract the plaintiff threshed wheat for the defendant for three days, and had to quit work because the defendant was unable to obtain a sufficient number of hands to keep the machine in operation. The plaintiff threshed about 784 bushels of wheat, being about one-third of the defendant's grain, and which at forty cents per acre would amount to the sum of \$17. There is some testimony tending to show that the plaintiff was to return and complete the job, although upon that point there is some conflict. The plaintiff, ignoring his contract, seeks to recover the value per bushel for threshing the wheat in question. The court instructed the jury that, "if you find from the evidence that the contract for the threshing in 1878 was broken by the plaintiff, that fact will not prevent him from recovering for what he actually did, and you will allow him what it was reasonably worth as shown by the evidence. But you will then proceed to ascertain how much, if any, damages the defendant (McMillan) sustained by reason of Malloy's failure to comply with the agreement. Ascertain to whom

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the greater amount is due; deduct the less amount from the greater and return your verdict for the balance." To which instruction the defendant excepted, and now assigns the giving of the same for error.

The plaintiff in error insists that a recovery upon a *quantum meruit* cannot be had upon part performance of an entire contract of this sort, where there is no waiver nor voluntary acceptance by the defendant. We are aware that there are a large number of cases, most of them tried in courts having no equity powers, holding that no recovery can be had in such case. These decisions are placed upon the ground that the contract is *entire*, and that no recovery can be had on the contract until the plaintiff has performed his part of the same. And where a contract is entire and indivisible, and payment is to be made only after full performance, no action can be maintained on part performance. But when the contract is susceptible of division, and its entirety has been destroyed by part performance, from which the other party has derived a benefit, the law raises an implied promise to pay to the extent of the benefit received; and an action may be maintained thereon after the time has expired for the completion of the contract.

In the leading case of *Oxendale v. Wetherell*, 9 B. & C., 386, an action was brought to recover the price of 130 bushels of wheat sold and delivered by the plaintiff to the defendant at 8 shillings per bushel. The defendant proved that he made an absolute contract for 250 bushels, and contended that as the plaintiff had not fully performed, he could not recover. It was held that the plaintiff, having retained the 130 bushels, after the time for completing the contract had expired, was bound to pay for the same.

In *Bowker v. Hoyt*, 18 Pick. 555, the plaintiff sold the defendant 1,000 bushels of corn, but delivered only 400 bushels. The court held in substance that the acceptance of a part of the corn was a severance of the entirety of the contract, and the defendant was bound to pay for the corn so delivered; but that he might reduce the plaintiff's claim by showing any damages he had sustained by the plaintiff's failure to fulfill his contract. 2 Smith Lead. Cas. (6th ed.) 33; 2 Pars. on Cont. (5th ed.) 523-4.

In *Britton v. Turner*, 6 N. H. 481, the plaintiff brought an action for work and labor performed by the plaintiff for the defendant from March 9, 1831, to December 27 of the same year. The defendant offered to prove that the work was done under a contract

for one year for the sum of \$100, and that the plaintiff left his service without his consent and without good cause. PARKER, C.J., in delivering the opinion of the court, after referring to certain cases where a recovery could be had, said: "Those cases are not to be distinguished in principle from the present, unless it be in the circumstance that where the party has contracted to furnish the materials, and do certain labor, as to build a house in a specified manner, if it is not done according to the contract, the party for whom it is built may refuse to receive it — elect to take no benefit from what has been performed — and therefore, if he does receive, he shall be bound to pay the value; whereas, in a contract for labor merely, from day to day, the party is receiving the benefit of the contract under an expectation that it will be fulfilled, and cannot, upon the breach of it, have an election to refuse to receive what has been done, and thus discharge himself from payment.

But we think this difference in the nature of the contracts does not justify the application of a different rule in regard to them. The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge also that the other party may eventually fail of completing the entire term. If, under such circumstances, he actually receives a benefit from the labor performed over and above the damages occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he perhaps enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it as it is. It is said that in those cases, where the plaintiff has been permitted to recover, there was an acceptance of what had been done. The answer is, that where there is a contract to labor from day to day for a certain period, the party for whom the labor is done in truth stipulates to receive it from day to day, as it is performed; and although the other may not eventually do all he has contracted to do, there has been necessarily an acceptance of what has been done in pursuance of the contract." See *Byerlee v. Mendel*, 39 Iowa, 382; *Pixter v. Nichols*, 8 id. 106. Other cases might be cited in support of these views, but these are sufficient.

In some of the early English cases it was held that in actions for work and labor, negligence or badness of materials constituted no defense to an action for the agreed price, but the party for whom the work was done must pay the stipulated price and resort to a cross action to indemnify himself for a deficiency in the consideration. *Browne v. Davis*, cited in 7 East, 480; *Templar v. McLadlan*, 2 N. R. 136; 2 Smith Lead. Cas. (6th ed.) 34. The doctrine of recoupment in such cases seems to have had its origin at a later date than the cases cited. *Basten v. Butter*, 7 East, 479. These facts must be kept in view in considering the early decisions, and doubtless had considerable weight in their determination. There is no difference in principle between the case of a vendee receiving and retaining a quantity of goods sold under an entire contract, after the vendor has refused to deliver the residue, and that of a party who has employed another to perform certain labor, but who, after performing a portion of the labor under the contract, neglects or refuses to perform the remainder. In neither case can an action be maintained on the original contract, but in both the party has received and appropriated what is done. And to the extent that he is benefited over and above the damage which has resulted from a breach of the contract by the other party, the law implies a promise to pay for such excess. Any other rule is fraught with gross injustice, and assumes that the party failing to perform is in all cases at fault, and offers an inducement to the opposing party indirectly to prevent a performance. But where a contract is shown to have existed, the measure of recovery for the services rendered is the price fixed in the contract, less the damages sustained by the employer by reason of the non-performance. *Doolittle v. McCullough*, 12 Ohio St. 360; *Corwin v. Wallace*, 17 Iowa, 374.

The court therefore erred in instructing the jury to allow what the work was reasonably worth. It is unnecessary to notice the other instructions. The defendant failed to prove damages, even if the jury had found that the plaintiff had failed to perform his contract in such manner as would entitle him to recover. There is a general allegation in the testimony of the defendant that he sustained \$25 damages; but he fails to state a single fact that would entitle him to recover. The jury therefore were justified in rejecting his claim.

As to the third cause of defense, there is no statement in the bill of exceptions as to what was proposed to be proved by the defend-

ant. It is not sufficient to be available on error, that the court sustains an objection to a question; the party must offer to prove certain facts, and if they are excluded, embody the testimony thus offered in the bill of exceptions. There is no error therefore available to the defendant in the third defense, as set forth in the answer.

As it is clear from the record that the weight of testimony sustains the verdict of the jury, but as damages were assessed under the instructions of the court for the reasonable worth of the threshing, instead of the contract price, the plaintiff in the court below has leave to remit from the judgment the sum of \$13 within thirty days from this date; and upon condition that said remittance is filed as above provided, the judgment of the District Court is affirmed. In case of the failure of the plaintiff to remit from the judgment the sum specified above within the time designated, the judgment is reversed, and the cause remanded for further proceedings, the costs in this court to be taxed to the defendant in error.

Judgment accordingly.

NOTE BY THE REPORTER.—In *Farrell v. McComber*, Nebraska Supreme Court, December, 1880, M. agreed to work for P. for one year, from October 1, 1876, for the sum of \$195; worked five months, and sued for his wages, March 2, 1877. Held, that he could recover the actual value of his labor, not exceeding the rate agreed upon, less any damages sustained by P. by reason of the failure of M. to work the entire year. The court said: "There is an important question presented in this case; one upon which it cannot be claimed that the authorities, either as expressed in the opinions of courts or the treatises of text-writers, are agreed. Until within the last fifty years it was quite generally held to be the law, both in England and America, that where a person, having agreed to work for another for a definite period of time, voluntarily leaves such service without any fault on the part of the employer, and without his consent, before the expiration of the term, he cannot recover in any form of action for the services actually rendered. The reasoning upon which the decisions holding this view were generally sustained is well expressed by MOORE, J., in delivering the opinion of the court in *Olmstead v. Beale*, 19 Pick. 528, in the following language: 'The plaintiff cannot recover on his express contract, because he has not executed it on his part, and the performance is a condition precedent to the payment. He cannot recover on a *quantum meruit* for the labor he has performed, because an express contract always excludes an implied one in relation to the same matter.'

"But in the case of *Britton v. Turner*, 6 N. H. 481, decided in 1834, a marked departure was taken from the former line of decisions. In that case, one quite parallel to the case at bar, it was held that 'where a contract is made of such a character a party actually receives labor or materials, and thereby derives a benefit and advantage over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereon raises a promise to pay to the extent of the reasonable worth of such excess.' And again: 'In fact, we think the technical reasoning that the performance of the whole labor is a condition precedent, and the right to recover any thing dependent upon it—that the contract being entire, there can be no apportionment, and there being an express contract, no other can be implied, even upon the subsequent performance of service—is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe that the general understanding of the community is that the hired laborer shall be entitled to compensation for the service actually per-

Ward v. School District.

formed, though he do not continue the entire term contracted for; and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary. Where a beneficial service has been performed and received therefor, under contracts of this kind, the mutual agreements cannot be considered as going to the whole of the consideration, so as to make them mutual conditions, the one precedent to the other, without a specific proviso to that effect.'

"This case has been quite generally though not uniformly followed, and the principles announced by it seem to be quite generally approved by the profession and the people; and while according much weight to some of the arguments on the other side, I think it would be unsafe to adopt them. The well-considered case of *Duncan v. Baker*, 21 Kans. 99,* contains the latest adjudication of the question involved in this case to which my attention has been called. After an exhaustive review of the authorities, the court reaches the same conclusions as those announced in *Britton v. Turner*. And so I think the law may be considered to be pretty generally settled throughout the western States." To the same effect in *Staples v. Newton*, 7 Or. 110; a. c., 38 Am. Rep. 705.

WARD V. SCHOOL DISTRICT.

(10 Feb. 1883.)

Office and office — school district treasurer — liability for money lost by failure of depository.

A school district treasurer deposited school money in a bank to his own individual credit, directing the bank to pay out of it certain school district bonds about maturing, payable at that bank. The bank failed and the money was lost. *Held*, that the treasurer was liable for it in an action on his bond.†

ACTION on bond of school district treasurer. The opinion states the case. The plaintiff had judgment below.

C. J. Phelps, for plaintiff in error.

Hoese, Russell & Chambers, for defendant in error.

LAKE, J. [Omitting a minor point.] Not only was this branch of the defendant's answer wholly inadequate as a defense, but in the matter of proof respecting the particular item of Ward's account in controversy they were equally unfortunate. The mode in which all school moneys must be disbursed is found in section 41 of the general school law, which provides that: "It shall be the

* See note, 31 Am. Rep. 108.—REF.

† See *Lowry v. Polk County* (51 Iowa, 53), 35 Am. Rep. 114; *Comm'rs of Jefferson County v. Amesberger*, ante, p. 462.

duty of the treasurer of each (school) district to apply for and receive from the county treasurer all school moneys apportioned to the district, or collected for the same by the county treasurer, and to pay over, on the order of the director, countersigned by the moderator of such district, all moneys received by him." Gen. Stat. 968. And by section 52 of the same act it is made the duty of the director to "draw and sign all orders upon the treasury for all moneys to be disbursed by the district, and all warrants upon the county treasurer for moneys raised for district purposes, or apportioned to the district by the county superintendent, and present the same to the moderator to be signed by him." Gen. Stat. 970.

From these provisions of the statute, as well as others that might be quoted of similar import, we see that the funds belonging to school districts are carefully guarded against illegal disbursement, either through fraud or mistake. The order for its payment in every case must be drawn and signed by the director, then it must pass the scrutiny of and be signed by the moderator, and finally the treasurer himself must be satisfied that it was drawn for a legal object, and upon the proper fund, before he is justified in parting with the money. And further, the treasurer should take a receipt from the person to whom such payment is made, so that he may have the same as a voucher to exhibit at the annual meeting in his settlement with the district, as provided in section 42 of the school law. Now it is not pretended in this case that Ward paid out the \$262.90 sued for on such order, nor even that he paid it on any order. It is undisputed that Ward had deposited the money to his own individual credit in Frank E. Frye's bank, in Schuyler, and while in this condition the bank failed, resulting in its loss.

It is doubtless true that Ward informed Frye of the purpose for which he intended this deposit to be made. And it is probable that he directed Frye to pay it over to the holder of certain of said school district bonds then about to fall due, and which were made payable at said bank. But in all this Frye was the agent of Ward, and not of the school district. It was Ward's duty, under the law, to keep the money securely until properly directed, as before shown, to pay it over to the holder of the district bonds. The money was within his control, placed there by force of the statute, and if he saw fit to intrust it to the care of another he did so at his peril.

 Skinner v Reynick.

Under the testimony the court was clearly right in instructing the jury to find a verdict in favor of the school district, for none other could be upheld.

Judgment affirmed.

 SKINNER V. REYNICK.

(10 Neb. 222.)

Homestead — mortgage — assumption of — estoppel.

A homestead may be mortgaged, and one who purchases the premises subject to and agreeing to pay such mortgage, cannot avoid it.

ACTION of foreclosure. The opinion states the case. The defendant had judgment below.

J. B. Barnes, for appellant.

Vanatta & Son, for appellees.

MAXWELL, C. J. This is an action to foreclose a mortgage on real estate. The petition alleges that on the twentieth day of May, 1875, George Reynick and Mary, his wife, being possessed of a homestead on the public lands under the laws of the United States, upon which final proof had not been made, mortgaged the same to the plaintiff to secure the sum of \$40; that after completing the entry of said lands, and on or about the thirty-first day of March, 1876, Reynick and wife sold and conveyed the same, subject to said mortgage, to one Edward Newton, who, on or about the first day of April of that year, sold and conveyed said lands, subject to said mortgage, to one James G. Bailey, one of the defendants in this action, who promised to pay the same. It is also alleged that through mistake the mortgage was not recorded; that the same has not been paid, and that no action at law has been brought to recover the amount due thereon. The defendant Bailey demurred to the petition on the ground that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was sustained and the action dismissed. The plaintiff appeals to this court.

Is the defendant Bailey in a condition to question the validity of the mortgage in question? We think not. In *Kruger v. Harves-*

Forbes v. Omaha National Bank.

ter Co., 9 Neb. 526, where one Kruger purchased certain lands subject to a certain judgment lien, the amount thereof being deducted from the purchase-money, it was held that he could not question the validity of the judgment, although it was not in fact a lien upon the land. So in the case at bar it is alleged that the defendant Bailey purchased the land in question subject to the mortgage, and that he agreed to pay the same. This being the case, it can make no difference to him whether as between the plaintiff and Reynick and wife the mortgage is invalid or not. They do not complain, and the defendant cannot.

In the case of *Jones v. Yoakam*, 5 Neb. 265, it was held that the only effect of the prohibition in the homestead law was to protect the owner thereof against compulsory payment of a debt contracted before the patent was issued; but did not prevent him from voluntarily pledging the same to secure even a pre-existing debt.

The judgment of the District Court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

FORBES V. OMAHA NATIONAL BANK.

(20 Neb. 388.)

Negotiable instruments — notice of protest by mail.

An indorser living outside the place of dishonor, but nearer to the post-office in such place than any other, and obtaining his mail matter there, yet having no regular or usual place of business therein, cannot be held by notice of dishonor deposited in such post-office. (*See note, p. 487.*)

ACTION on draft, against accommodation indorser. The opinion states the facts. The plaintiff had judgment below.

George W. Doane, for plaintiff in error.

E. Wakeley, for defendant in error.

COBB, J. Several questions are presented by the record in this case; but as one of them appears to me to quite overshadow the others in point of importance, and the conclusion reached in its examination being decisive of the case, I deem it unimportant to consider the others.

Forbes v. National Bank of Omaha.

The district court found "that the said Samuel Hawver and R. M. Forbes were respectively duly notified of such presentment, non-payment, and refusal, and that the plaintiffs would look to them respectively for payment of the same, with damages and costs.

"That at the time of such presentment and notification the said R. M. Forbes resided about one mile, or one and a quarter miles, outside of the corporate limits of the city of Omaha, in the State of Nebraska, where the said bank was situated and did business, and said draft was payable, and where the notary hereinafter mentioned resided, and that said R. M. Forbes had no regular or usual place of business in said city; that the post-office at which he then obtained his mail was the post-office in the city of Omaha, and which was the nearest post-office to his residence, and about three miles therefrom.

"That on the evening of October 23, 1871, when the note was presented for payment, one William Wallace, a notary public and agent of the plaintiff's bank, deposited in the post-office at Omaha notice in due form of the presentment and dishonor of said draft, and that plaintiff would look to him for payment thereof, directed to the said R. M. Forbes at the post-office in Omaha, with the postage thereon paid."

Thus, while the court finds that the said Samuel Hawver and R. M. Forbes were respectively duly notified of such presentment, non-payment, refusal, etc., it does not fail to put us in possession of the facts upon which it bases such finding, so far as the plaintiff in error is concerned; and the question, whether such facts do sustain the finding that the plaintiff in error was duly notified, is in my opinion the controlling one in this case.

While the evidence of the fact of the depositing of the notice in the post-office is not by any means clear, yet as the same was deemed sufficient by the trial court, I will confine my examination to the question whether such fact, taken in connection with the collateral facts and circumstances surrounding this case, constitutes legal notice. This question has often been before the courts of several of the States of the Union, and once before the Supreme Court of the United States. It has not been previously brought before this court, and as the views and decisions upon it of the several State and Federal courts are altogether conflicting and irreconcilable, this court should be free to decide it in this case, as may seem most likely to meet the ends of justice, and at the same time

establish a precedent the least liable to lead to unfairness or abuse.

The question may be fairly stated thus: whether, where the drawer or indorser of a draft, note, or bill of exchange resides outside of the corporate limits of a city or village, which is the place of dishonor of such draft, note, or bill of exchange, but nearer to the post-office in such city or village than to any other post-office, notice of the dishonor of such draft, note, or bill of exchange can be legally given to such drawer or indorser by depositing the same in such post-office, directed to such drawer or indorser.

In the case of *Ireland v. Kip*, which was twice before the Supreme Court of the State of New York (10 Johns. 489, in 1813, and 11 id. 231, in 1814), it was held that where the indorser to be charged resided at Kip's Bay, within the corporate limits of New York city, but outside of the compact portion of the city, and where the letter-carriers did not deliver letters, but had a place of business on Frankfort street, within the compact part of the city, where he had directed the letter-carriers to leave all of his letters, and the notice of dishonor was put into the post-office in New York city, directed to the indorser at his place of business on Frankfort street, the same was not sufficient notice of the dishonor of the bill to charge the indorser. In the opinion the court uses this language: "The invariable rule with us is that when the parties reside in the same city or place, notice of the dishonor of bills or notes must be personal, or something tantamount, such as leaving it at the dwelling-house or place of business of the party, if absent. If the party to be served by a notice resides in a different place or city, then the notice may be sent through the post-office to the post-office nearest the party entitled to the notice." The authority of this case has never been shaken; but unfortunately, when the courts came to apply it to cases like the one at bar, they separated widely; the Supreme Courts of New York, Connecticut, Massachusetts, Maine, Louisiana, and Tennessee, holding in effect that the words city or place, as used by the court in *Ireland v. Kip*, should be understood as meaning the place in fact rather than in law, and that the indorser or maker entitled to notice of dishonor must be served personally, or by leaving the notice at his residence or place of business, unless he resides nearer to some other post-office, in which case notice may be sent to him by mail.

Say the court, per BRONSON, J., in *Babcock v. Burnham*, 4 Hill,

129: “* * * The post-office is not a place of deposit for notices to indorsers, except where the notice is to be transmitted by mail to another office.”

In *Ransom v. Mack*, 2 Hill, 587, the same judge, in delivering the opinion of the court, uses the following language: “The corporation limits of our cities and towns have, I think, less to do with this question than the mail arrangements of the general government, and the business relations of our citizens. Whether mail service is good or not does not depend upon the inquiry whether the person to be charged resides within the same legal district, but upon the question whether the notice may be transmitted by mail from the place of presentment or demand to another post-office where the drawer or indorser usually receives his letters and papers.”

In the case of *Shelburne Falls National Bank v. Townsley*, 102 Mass. 177; s. c., 3 Am. Rep. 445, decided in 1869, AMES, J., delivering the opinion of the court, says: “The letter was left at the post-office, not for the purpose of being transmitted by mail to another town or post-office, and not to go into the hands of any official carrier charged with the distribution of letters at the dwelling-houses and places of business of the inhabitants of the vicinity; on the contrary, it did not go into the mail at all, but was simply deposited at the Shelburne Falls post-office, to remain there until called for by the defendant.

“We do not find that any case has gone so far as to decide that notice through the post-office may be given in the same manner, and with the same allowance of time, where both parties reside in one town, or resort to the same post-office, as where they reside in different towns communicating with each other by regular mails. There may be but little practical difference in this respect between letters left for deposit and those left for transmission. But we do not feel at liberty for such considerations to disregard distinctions, even though they appear somewhat arbitrary, or attempt to improve rules that have become settled by judicial decisions and the usage of business. * * * In the instructions which were given to the jury this distinction appears to have been overlooked, and they may have given their verdict under the impression that a drop-letter left at the post-office after the close of the business day on the 11th, and not likely to be received until the 12th, would be reasonable notice, even though the plaintiff bank had received the same as early as the 10th; in other words, that the rule as to post-

office notifications, where both parties reside in the same town or village and resort to the same post-office, and where no system of distribution by means of letter-carriers has been established, would be the same as if they lived in separate towns having regular communication by mail. Upon this point therefore the defendant's exceptions must be sustained."

In the case of the *Louisiana State Bank v. Rowell*, 6 Mart. (N. S.) 267, the Supreme Court of Louisiana, by PORTER, J., who delivered the opinion, say " * * * The case has been well argued, but the reasoning of the counsel, in our opinion, rested entirely on an incorrect view of the obligation contracted by an indorser of instruments of this kind. The obligation which such an act creates is strictly a conditional one, and that condition is that he will pay the money in case the maker does not, provided due notice is given to him of the default of the former. By the *lex mercatoria* this fact must be proved by establishing that knowledge of the failure of the principal to pay was communicated personally to the indorser, or that information to that effect was left at his house. A relaxation of this rule has been introduced for the convenience of trade, when the indorsers live at such a distance that their residence is nigher another post-office than where the holder lives; in such cases it is sufficient to send by mail a notice directed to the indorser."

All of these cases, and many others cited in the brief of counsel, seem to hold that where the person whose duty it is to give the notice and the one to be charged by the notice both reside within the same post-office delivery—a term well understood in this country—that then the notice must be served personally, or left at the residence or place of business of the person to be charged, and that the post-office can only be resorted to in cases where the person to be notified resides nigher to or is in the habit of receiving his mail matter at another post-office, to which the notice may be sent by mail. And this I believe to be the correct rule.

It is true there are many decisions the other way, and as a question of authority it would be one quite difficult to decide. The Supreme Court of the United States, and those of Pennsylvania, Indiana, Missouri, and, as is claimed, South Carolina, have held to the contrary—that when the person to be notified resides outside of the legal limits of the town, city or village where the party giving the notice resides, but nigher thereto than to any other post-

office, or is in the habit of resorting to the post-office in such town, city or village for mail matter, then the notice may be legally served on him by depositing the same in such post-office, directed to the party to be notified at the post-office where the same is deposited.

In enumerating the States where this question has been decided either way I do not include Kentucky, because that State is about equally divided on the question. The former view having been taken by the old Supreme Court presided over by JOHN BOYLE, C. J., in 1832, and the latter by the Supreme Court of that State in 1858 in an exhaustive opinion by Judge STILES. Nor do I include Mississippi, where the question has been several times before the Supreme Court, and where, unfortunately, the holdings have not been uniform. But their latest two, and I think best reasoned cases, follow New York, Massachusetts, etc.

But all the cases, as well those which hold the latter as the former view, agree in this, that where the person to be notified resides in the same city or village with the person whose duty it is to give the notice, then notice cannot be given through the post-office.

Having carefully examined all of the cases cited by counsel, I have failed to find any sufficient reason, or indeed any reason, for a distinction in this respect between persons residing within the city or village limits and those who, though living outside of such limits, are within the post-office delivery.

Had this court the power to change the law it might be worth considering whether it would not be well to provide that all notices might be served through the post-office. But were any change in that direction contemplated certainly no one would think of excluding from its operation only those who from the contiguity of their residence to the post-office as well as from the nature of their business pursuits, are the most unlikely to be incommoded by such change. Those inhabitants of a city or village who are at all likely to draw or indorse commercial paper generally keep themselves in daily intercourse with the post-office, and when not absent from home would nearly always receive a notice posted to them at their own post-office the same or the next day. But this cannot be said of those who live in the country. They as a rule seldom go to the post-office oftener than once a week to receive their weekly newspaper, or less often, as called for by the needs of family cor-

respondence. Persons thus situated would not generally receive a notice of protest through the post-office in time to answer the purposes for which notices are required, to wit: to give the indorser or drawer a fair start with others in pursuit of the property of a defaulting principal. Again, the inhabitants of cities and villages who draw or indorse commercial paper are as a rule business men, who do it as a part of their regular business, and carefully note and watch the dates of the maturity of such paper, and whether or not it is duly honored. While many farmers and other inhabitants of the country are in the habit of becoming accommodation indorsers for business men, they keep no dates, but rely confidently on their principal to protect their paper. To such, a prompt and certain notice of dishonor often may save them from ruin.

It is true that the rule is well settled that where the person entitled to notice resides so far away from the place of dishonor that his place of residence is nearer to another post-office, or where he habitually resorts to another post-office for mail matter, then notice may be sent to him by mail. This arises from the nature and necessities of the case; and besides, it is a fair presumption, where a person draws or indorses commercial paper payable at a distant bank or place, that he thereby impliedly agrees to receive notice of its dishonor through the post-office, the usual channel of communication between distant points. But not so an indorser of paper payable at a bank situated within his own post-office delivery.

In most of the cases where the courts have come to a conclusion different from that which I have been able to reach in the examination of this question, they give as a controlling reason for such conclusion that to require personal notice or its equivalent to indorsers residing outside of the limits of cities and villages would be to lay an additional burden upon the holder. I am unable to accord much weight to this reason. Notaries' fees for protest and notice, including mileage, follow the protested paper; and the cost of sending a notary or special messenger to serve a notice anywhere within the delivery of any post-office in the settled portion of the country would be but trifling compared to the amount generally involved, and I think it affords a fair application of the maxim, *de minimis non curat lex*.

As to the point that although the plaintiff in error may not have been legally notified, he afterward waived such notice, I have only to say that no such waiver was found by the District Court,

Delany v. Errickson.

and had it been I do not think that there was sufficient evidence to have sustained it.

The judgment of the District Court is therefore reversed and a new trial ordered.

Reversed and remanded.

NOTE BY THE REPORTER.—In addition to the authorities cited in the opinion in support of this ruling, may be cited *Farmers' Bank v. Battle*, 4 Humph. 86; *Barker v. Hall*, Martin & Yerg. 133; *Patrick v. Beasley*, 6 How. (Miss.) 609. The contrary is maintained in *Bank of Columbia v. Lawrence*, 1 Pet. 573; *Walker v. Bank of Augusta*, 3 Ga. 496; *Bank of U. S. v. Norwood*, 1 Harr. & J. 493; *Gist v. Lybrand*, 3 Ohio, 307; *Carson v. Bank of Alabama*, 4 Ala. 143; *Jones v. Lewis*, 8 W. & S. 14; *Timms v. Delisle*, 5 Blackf. 477; *Foster v. Smeath*, 2 Rich. 323; *Walker v. Bank of Missouri*, 8 Mo. 904; *Bondurant v. Everett*, 1 Metc. (Ky.) 633. Mr. Daniel says: "The mere fact that he would get the letter out of the same office it was put in, instead of a distant one, should not vitiate the method of communication, every reason of convenience and certainty which applies in one case, applying with equal force in the other." "The opposite view is severe and technical, and does not rest, that we perceive, upon any principle of convenience, utility, or justice." Dan. on Neg. Inst., § 1015. See, also, *Bank of Columbia v. Lawrence*; Bigelow's Bills and Notes, 323, and note, 327. Parsons says (Notes and Bills, 434), "The true test would then seem to be only the fact whether the holder and the party to whom the notice is to be sent reside in the town, or not." *Louisiana State Bank v. Bowell*, cited in the principal case, and its doctrine seems now to be overruled in Louisiana. *Bk. of Louisiana v. Tourrillon*, 9 La. Ann. 123.

DELANY V. ERRICKSON.

(10 Neb. 422.)

Evidence—letter-press copies.

Letter-press copies of private writings are not admissible as original evidence.*

ACTION of trespass. The opinion states the point. The plaintiff had judgment below,

E. F. Gray and *W. H. Munger*, for plaintiff in error.

G. L. Loomis and *N. H. Bell*, for defendant in error.

COBB, J. [Omitting other matters.] The only remaining point which I deem it necessary to examine is that arising upon the objection, on the part of the plaintiff in error, to the admission in evidence of a letter-press copy of a letter written by G. W. E. Dorsey to E. B. Young, without first accounting for the original. I

* See *Eborn v. Simpleman* (47 Tex. 503), 26 Am. Rep. 312.

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know of no law or authority taking letter-press copies of private papers out of the general rule, which prohibits that character of secondary evidence, except in certain cases of necessity, arising upon the loss or accidental destruction of the originals. But on the contrary, in the only adjudicated case which I am able to find bearing directly on the point (*Foot v. Bentley*, 44 N. Y., 170; s. c., 4 Am. Rep. 652) the Commission by GRAY, C., say: "We are of opinion that they (letter-press copies of letters) were not in any sense original papers, and were in their character copies to the same extent that other copies carefully compared would have been, neither of which could be read in evidence without first giving notice to produce the originals." And this I think to be the law.

It therefore follows that the judgment of the District Court must be reversed, and the cause remanded for further proceedings according to law.

Reversed and remanded.

 SIOUX CITY AND PACIFIC RAILROAD CO. v. FIRST NATIONAL BANK OF FREMONT.

(10 Neb. 558.)

Bill of lading — by agent — estoppel of principal by.

A railroad company is estopped as against a *bona fide* purchaser, to deny a bill of lading issued by its authorized agent, although the goods were not received by the company.*

ACTION on bills of lading pledged by the consignor as security for annexed drafts drawn by him upon the consignee, and discounted by the plaintiff. The opinion states the other facts. The plaintiff had judgment below.

Joy & Wright, and *N. H. Bell*, for plaintiff in error.

Marlow & Munger and *Marshall & Sterret*, for defendant in error.

MAXWELL, C. J. [Omitting statement.] It will be seen that the object of the action is to hold the railroad company liable on

* See *Wittler v. Collins*, ante, p. 327.

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two bills of lading executed by its station agent to one Watkins, one of said bills being dated November 13, 1877, for two cars of wheat, and the other dated November 15, 1877, for three cars of wheat, which bills of lading were transferred to the bank, the bank advancing \$1,500 on them, relying on the statements therein contained that Watkins had shipped five full cars of wheat, when in fact the cars mentioned in the first receipt contained about one-half a carload of wheat and about one-half a carload of barley, and the three cars mentioned in the second receipt were never in fact shipped, and no wheat was in fact received by the railroad company at the time the receipt was given. Is the company liable under such circumstances upon the bills of lading? In the case of *Grant v. Norway*, 2 Eng. Law and Eq. 337, it was held that the master of a ship has no general authority to sign a bill of lading for goods which are not put on board the vessel; and consequently the owners of the ship are not responsible to parties taking a bill of lading which has been signed by the master without receiving the goods on board. This case was decided in the Common Pleas in 1851. No authorities are cited by the court to sustain its position, the court saying: "There is but little to be found in the books on this subject; it was discussed in the case of *Berkley v. Watling*, 7 Ad. & El. 29; but that case was decided on another point, although LITTLEDALE, J., said in his opinion the bill of lading was not conclusive under similar circumstances on the ship owner." This decision was followed in *Hubbersty v. Ward*, 18 id. 551, in the Court of Exchequer, POLLOCK, C. B., placing the decision upon a lack of power in the master. See, also, *Coleman v. Riches*, 29 id. 329. These decisions were followed by the Supreme Court of the United States in the case of the *Schooner Freeman v. Buckingham*, 18 How. 182. In that case the claimant, being the sole owner of the schooner named, contracted with one John Holmes to sell it to him for the sum of \$10,000, payable by installments at different dates. By the terms of the contract John Holmes was to take possession of the vessel, and if he should make all the agreed payments, the claimant was to convey to him. The vessel was delivered to Holmes under this contract and he had paid one installment, the only one which had become due. Holmes permitted his son, Sylvanus Holmes, to have the entire control and management of the vessel and to appoint the master. Sylvanus Holmes transacted business under the style of S. Holmes & Co., and the flour mentioned in the bills of lading as

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having been shipped by him was never in fact shipped, the master having been induced to sign the bills of lading by fraud and imposition. The question before the court is thus stated in the opinion: "But the real question is, whether in favor of a *bona fide* holder of such bills of lading procured from the master by the fraud of an owner *pro hac vice*, the general owner is estopped to show the truth, as undoubtedly the special owner would be." It was held that the maritime law gave no lien upon the vessel, and that the general owner thereof was not estopped from alleging and proving the facts. In the case of *Dean v. King*, 22 Ohio St. 118, it was held in an action by the shipper against the owner of a steamboat engaged in the business of common carriers, to recover for goods as per bill of lading, that the defendants are liable only for so much of the goods as was actually received on the boat or delivered to some one authorized to receive freight on her account. This seems to have been an action between the original parties. In *Dickerson v. Seelye*, 13 Barb. 99, the court held that as between the shipper of the goods and the owner of the vessel, a bill of lading may be explained as to the quantity and condition of the goods, yet it cannot be so explained as between the owner of the vessel and a consignee or assignee of the bill of lading who has in good faith advanced money on the strength of it, and has thus been induced by the master's signing the bill to do an act changing the situation of the parties. In such case the bill of lading is conclusive on the owner in respect to the quantity of goods. The court say: "As between the owner of the vessel and an assignee for a valuable consideration paid on the strength of the bill of lading, it may not be explained. *Portland Bank v. Stubbs*, 6 Mass. 422; 4 Am. Dec. 151; Abb. on Shipping, 323-4; *Bradstreet v. Lees*, MS., U. S. Dist. Ct. In such case the superior equity is with the *bona fide* assignee, who has parted with his money on the strength of the bill of lading."

In the case of *Armour v. Michigan C. R. R. Co.*, 65 N. Y. 111; s. c., 22 Am. Rep. 603, the defendant's agent, having authority to issue bills of lading, upon delivery to him by M. of a forged warehouse receipt, issued to M. two bills of lading, each stating the receipt of a quantity of lard consigned to plaintiffs at New York, and to be transported and delivered to them. M. drew sight drafts on the plaintiffs, to which he attached the bills of lading; these were delivered to a bank and were forwarded to New York, and the drafts were paid by plaintiff upon the faith and credit of the bills

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of lading. It was held that the defendant was bound by the acts of its agent, the same being within the apparent scope of his authority, and was estopped from denying the receipt of the lard. In the case of the *Savings Bank v. A. T. & S. F. R. R. Co.*, 20 Kans. 519, the court held that where the agent of a railroad company has authority to receive grain for shipment over its road, and issue in the name of the corporation a bill of lading for each consignment received, and issues two original bills of lading for a single consignment, the two bills of lading having been assigned to the bank, which advanced money thereon in good faith, and the shipper being insolvent and having absconded, the railway company was estopped by its statement and promise in the bill of lading to deny that it has received the grain mentioned therein. The court say: "The custom of grain dealers is to buy of the producer his wheat, corn, barley, etc., then deliver the same to the railroad company for shipment to market. The railroad company issues to the shipper its bill of lading. The shipper takes his bill of lading to a bank, draws a draft upon his commission merchant or consignee against the shipment, and attaches his bill of lading to the draft. Upon the faith of the bill of lading and without further inquiry the bank cashes the draft, and the money is thus obtained to pay for the grain purchased, or to repurchase other shipments. In this way the dealer realizes at once the greater value of his consignments, and need not wait for the returns of the sale of his grain to obtain money to make other purchases. In this way the dealer with a small capital may buy and ship extensively; and while having a capital of a few hundred dollars only, may buy for cash and ship grain valued at many thousands. This mode of transacting business is greatly advantageous both to the shipper and the producer. It gives the shipper who is prudent and posted as to the markets almost unlimited opportunities for the purchase and shipment of grain, and furnishes a cash market for the producer at his own door. It enables the capitalist and banker to obtain fair rates of interest for the money he has to loan, and insures him, in the way of bills of lading, excellent security. It also furnishes additional business to railroad companies, as it facilitates and increases shipments to the markets. A mode of doing business so beneficial to so many classes ought to receive the favoring recognition of the courts to aid its continuance." The question whether or not bills of lading are negotiable does not enter into the case. All the testimony

shows that the bills of lading in controversy were issued by an authorized agent of the railroad company, and that he not only had authority to issue such bills, but it was one of the duties imposed upon him. As against an innocent purchaser of the bills it will not do to say that the agent had authority to issue bills of lading duly signed, only in cases where shipments were made, and no authority where shipments were not made. The company itself has invested its own agent with the authority to issue bills of lading, and when duly issued they are not the bills of the agent but of the railroad company. The representation therefore thus made in the bills that the company has received a certain quantity of grain for shipment, is a representation to any one, who, in good faith relying thereon, sees fit to make advances on the same. If these representations are false, who should bear the loss? The party who appointed, placed confidence in, and gave authority to make the bills, or the one that in good faith, relying thereon, purchased or advanced money on the same? In *Lickbarrow v. Mason*, 2 T. R., 63 (1 Smith Lead. Cas., 6 Am. ed. 1044), ASHURST, J., says: "We may lay it down as a broad, general principle, that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled said third person to occasion the loss must sustain it."

This case presents every element necessary to constitute an estoppel *in pais*, a representation made with full knowledge that it might be acted upon, and subsequent action in reliance thereon by which the defendants in error would lose the amount advanced if the representation is not made good. This principle was entirely overlooked in *Grant v. Norway*, and the cases following it. The defendant in the court below is therefore liable to the bank to the extent of the amount advanced on the faith of these bills, not exceeding the value of the grain certified to as having been shipped. Objections are made to the proof of the price of wheat at Scribner at the time stated in the bills, to proof in reference to the grade of wheat shipped from that place, and to the weight of an ordinary car-load, but as the verdict is for several hundred dollars less than the amount advanced by the bank on the bills of lading in question, and much less than it should have recovered, it is unnecessary to consider them. There is no error in the record of which the plaintiff in error can complain, and the judgment must be affirmed.

Judgment affirmed.

TOWNSEND V. STAR WAGON COMPANY.

(10 Neb. 615.)

Negotiable instrument — alteration — insertion of place of payment.

The unauthorized insertion of a place of payment in a promissory note made payable generally, is a material alteration that avoids the note as to an indorser.

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

W. H. Morris, for plaintiff in error.

M. B. C. True, for defendant in error.

COBB, J. The defense chiefly relied upon by the plaintiff in error upon the trial in the District Court was, that the note sued on had been materially altered after the same had been guaranteed by him and had passed out of his possession. Plaintiff in error was sworn as a witness on his own behalf at the trial. He testified in substance that the firm of J. M. Townsend & Co., of which firm he was the acting member, and of which Mr. Fowler was also a member, took the note in question. That in February, 1877, the firm was dissolved, and upon settlement he guaranteed and delivered the note to Mr. Fowler. I quote his testimony at some length: "Q. State what you did with that note. A. I turned it over to Fowler & Co. Q. At that time was it in the same condition it is in now? When you turned it over to Fowler & Co.? A. No. Q. Well, how has it been changed? A. This (reading from the note) express office here was not on it at that time. Q. When was the first time you heard of it or heard of that note after you gave it to Fowler & Co.? A. The first, I believe, I saw this note was at the Probate Court office. * * * Q. You may state whether you turned that note over and how you came to do it? To turn it over? A. Mr. Fowler & Co., were partners in the firm of Townsend & Co. By mutual consent we dissolved and published notices of dissolution. Q. Well, after that what did you do? A. At the same time we dissolved I turned this note over for a share coming from me — that is, we

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settled up and dissolved, and I gave this note to Fowler & Co. in settlement of our business. Q. At this time was this alteration made? A. It was not. * * * Q. Was that alteration in that note made with your knowledge? A. No. Q. Or with your consent? A. No, not with my consent. I did not know that it was made then. Q. Did they ever tell you that it was made? A. No."

There was considerable further testimony, all tending to prove that the alteration in the note was made by Fowler, but nothing as to the time when it was made—whether before or after the dissolution of the partnership of J. W. Townsend & Co.

In the case of *Brown v. Straw*, 6 Neb. 536; s. c., 29 Am. Rep. 369, this court laid down the rule in the following language: "After an instrument is completed and delivered no alteration can be made therein except by the consent of the parties." This, of course, means a material alteration, and that is material which may become material. But as to whether the insertion of a place of payment where none was contained in the note when executed and delivered is such a material alteration as will vitiate the note, the question was settled in this country by the Court of Errors of New York in 1821 in the case of *Woodworth v. Bank of America*, 19 Johns. 392. Senator SKINNER, in delivering the opinion of the court, says: "The rule that a man is not to be held to a contract which has been varied without his assent is perfectly well settled; and if an instance can occur where it ought to be applied with peculiar strictness, it is that of a surety, in which favorable light the plaintiff in error is entitled to be viewed. *Clason v. Morris*, 10 Johns. 538. And in my view it is wholly immaterial whether the indorser has been prejudiced by the alteration or not. The case of *Ludlow v. Simms* in this court, 2 Caines' Cas., confirms this position, and is not less conformable to strict justice than to the rules of law. It was there held by the unanimous opinion of this court that a surety was not bound beyond the strict terms of his contract; and although in that case the deviation from these terms was not shown to be injurious, but on the contrary was probably beneficial to the surety, yet he was discharged by it."

In the case at bar the plaintiff in error was sued as an indorser of a promissory note. When he indorsed it it was by its terms payable generally. Now, then, the contract which the plaintiff in error entered into by indorsing said note was, that if the same should be duly presented for payment to the makers at maturity—either to

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them personally or at their residences or places of business—and the same was not paid, and he should be duly notified of such presentation and non-payment, then he would pay the money called for by the note, together with legal costs of such demand and notification. From the pleadings and bill of exceptions it appears that after the making of such contract and the note passing out of his possession, it was without his knowledge or consent altered so that the same need not be presented for payment to the makers personally nor at their residence or place of business, but need only be presented at the express office. It further appears from the record that it was so presented—presumably at the express office—payment thereof refused, the plaintiff in error duly notified thereof, and afterward sued, not only for the contents of the note, but also for protest fees.

I think, therefore, that the said alteration was in a matter material to the rights of the parties, and that the same released the plaintiff in error from his liability thereon as indorser, in which character he is sued in this action. The verdict is therefore unsustainable by legal evidence; and as a consequence thereof it must be held that the District Court erred in overruling the motion for a new trial.

The judgment of the District Court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

CASES
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK.

GREEN V. DISBROW.

(79 N. Y. 1.)

Statute of limitations — mutual accounts.

Upon a store account the defendant had delivered to the plaintiff small quantities of merchandise at different times. *Held*, a case of "mutual accounts," or "reciprocal demands," to which the statute of limitations did not apply.

ACTION on account. The opinion states the case. The plaintiff had judgment below.

Samuel Hand, for appellant. The referee erred in holding the statute of limitations not applicable, and that there was, between the parties, a mutual, open and current account, in which there were reciprocal demands. *Catlin v. Skoulding*, 6 T. R. 189; *Chamberlin v. Cuyler*, 9 Wend. 126; New Code, § 386; Old Code, § 95; *Lester v. Smith*, 7 Barr. 381; *Ingram v. Sherard*, 17 S. & R. 347; *Hay v. Kramer*, 2 W. & S. 137; *Adams v. Carroll*, 85 Penn. St. 509; *Gold v. Whitcomb*, 14 Pick. 188; *Kimball v. Brown*, 7 Wend. 323; *Warner v. Sweeney*, 4 Nev. 101; *Peck v. Liverpool Steamship Co.*, 5 Bosw. 226; *Hallock v. Losee*, 1 Sandf. 220.

Rufus W. Peckham, for respondent.

EARL, J. This action was commenced June 23, 1869, to recover upon a store account for goods claimed to have been furnished by the plaintiff to defendant's son, Jonathan Disbrow, at the request of the defendant and upon his credit.

We think there was sufficient evidence to justify the finding of the referee that the goods were furnished upon the sole credit of the defendant and upon his promise to pay for them. The only defense, therefore, to be considered here, is the statute of limitations.

The account commenced on the 6th day of November, 1855, and continued to November 11, 1863; and during that time the defendant caused to be delivered to the plaintiff, by his son, certain small quantities of butter and eggs at different times to be credited upon the account, and the balance of the account, as adjusted by the referee is \$745.55. All the items of plaintiff's account accrued before June 23, 1863, except items amounting in all to the sum of \$104.29; and the last item of credit in the account is for eggs delivered to the plaintiff August 20, 1862.

The referee decided that there existed between the parties a mutual, open and current account, in which there were reciprocal demands, and hence that no part of the account was barred by the statute. The claim of the defendant is that the butter and eggs were delivered to and received by the plaintiff as payment upon the account, and hence that this is not a case of reciprocal demands within the meaning of the statute; or in other words, that the defendant never had a right of action against the plaintiff for the butter and eggs, and hence that there were not reciprocal demands, within the meaning of the statute.

There was sufficient proof to justify the referee in finding that the butter and eggs belonged to the defendant and were delivered at his request. The evidence is that he directed his son and his wife to take the butter and eggs to the plaintiff and have them applied upon the account; and they took them to the plaintiff and he received them, and without any particular direction or agreement with him, he at once credited them in his account. No other account was kept of them except that kept by him. That this is a mutual, open and current account of reciprocal demands, within the meaning of the statute, I can entertain no doubt.

By the common law there was no stated or fixed time as to the bringing of personal actions. The time for the commencement of

such actions was first regulated in England by the statute, chapter 16 of 21, James I. But from the operation of that statute were excepted "such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants." It was held that the exception in that statute applied only to the action of account or to an action on the case for not accounting, and after considerable vacillation in the decisions, that accounts within the exception were not barred even if there were no items on either side of the account within six years. *Robinson v. Alexander*, 8 Bligh (N. S.), 352; *Inglis v. Haigh*, 8 M. & W. 770. It was also held that the exception in the statute extended only to accounts concerning the trade of merchandise between merchant and merchant, and not to other accounts. Other accounts were held to be within the statute, and the cause of action upon them was held to accrue from the last item of credit therein. In *Catling v. Skoulding*, 6 T. R. 189, Lord KENYON, speaking of a case not within the exception in the statute, said: "I take it to have been clearly settled, as long as I have any memory of the practice of the courts, that every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterward to be ascertained; and any act which the jury may consider as an acknowledgment of its being an open account is sufficient to take the case out of the statute." It was only mutual, open and current accounts that could come within the exception of the statute as to merchants' accounts; and in the case of accounts not concerning the trade of merchandise, to escape the bar of the statute there must have been in the account an item of credit within six years.

The statute of James, with slight verbal alterations, became the law of this State, and the exception as to merchants' accounts continued until the adoption of the Revised Statutes. See the "Act for the Limitation of Criminal Prosecutions and of Actions at Law," passed April 8, 1801. And it was early held that the law as enacted in this State should receive the same construction as the statute of James had received in England. *Ramchander v. Hammond*, 2 Johns. 200.

There was some confusion and uncertainty in the English decisions, and there was soon some departure in this State from the law as settled in England.

The provision of the Revised Statutes (2 R. S. 297, § 23) is as

follows: "In all actions of debt, account or assumpsit brought to recover a balance due upon a mutual, open and current account, the cause of action shall be deemed to have accrued from the time of the last item proved in such account." The language used in this section was not, it is believed, intended to work any change in the prior law, as appears from the note of the revisers to this section, which is as follows: "This section is proposed instead of the expression in section 5, 1 R. L. 186, 'other than actions which concern the trade of merchandise between merchant and merchant, their factors or servants.' This has given occasion to numerous decisions, some of them contradictory, which left the law for many years quite uncertain. It is now decided, 1. That the exception in the statute extends to all persons whether merchants or others; (*Murray v. Coster*, 20 Johns. 583; 11 Am. Dec. 333), and most of the modern cases support this remark; 2. That where all the accounts have ceased for six years, the demand is barred, and consequently that where there is an open, current, mutual account within six years, the whole account may be recovered. 2 Johns. 201; *Coster v. Murray*, 5 Johns. Ch. 522; *William v. Gwyn*, 2 Saund. 127; *Tucker v. Ives*, 6 Cow. 193. 3. That the limitation of the statute applies as well to accounts between merchants as others, notwithstanding the exception. *Barber v. Barber*, 18 Vesey, 286. It has therefore been supposed better to express the actual state of the law in the language of the courts than to retain a phraseology which is incorrect in its terms and leads to misconstruction."

The Revised Statutes, so far as I can discover, produced no change in the decisions in this State, and after they took effect the law was expounded as it had been before. *Green v. Ames*, 14 N. Y. 225.

The law as contained in the Revised Statutes remained in force until the Code, by which (section 95) it was provided as follows: "In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side."

The change in the phraseology was again, it is believed, not intended to work any change in the law. So say the codifiers in a note to that section in their original report to the legislature. The only material change are the words "where there have been

reciprocal demands between the parties," and these words they say were introduced "to obviate the obscurity in which the existing statute has been involved by loose expressions on the part of the courts, and to confine it to what is undoubtedly its true construction." And in the same note they speak of the accounts contemplated by this section as "mutual, open and reciprocal accounts," and say that the object of the provision, as contained in the Revised Statutes, as construed by the courts, was "to require that the accounts should be reciprocal in order to found a presumption in favor of items beyond six years;" and they further say that "to put an end, if possible, to all doubts on the subject, the most explicit language is used in the section proposed."

The words as to reciprocal demands introduced into the section of the Code are frequently met with in decisions made prior to the Code. In the case of *Coates v. Harris*, Bull. N. P. 150, DENNISON, J., held that "the clause in the statute of limitations about merchants' accounts extended only to cases where there were mutual accounts and reciprocal demands between two persons," and that is the earliest case I have found where the phrase "reciprocal demands" is used. It was there used simply to mean that the account must consist of items upon both sides, debit and credit. In *Coster v. Murray*, 5 Johns. Ch. 522, the chancellor used the phrase in the same sense, as follows: "In the present case there was no account current between the parties. There are no mutual and reciprocal demands. The demand is all on one side." And it was also used in the same sense in *Edmondstone v. Thomas*, 15 Wend. 554; *Belles v. Belles*, 7 Halst. 339; *Gulick v. Turnpike Co.*, 2 Green, 545; and in *Ingram v. Sherard*, 17 S. & R. 347. These cases in New Jersey and Pennsylvania were under statutes similar to that of James I. In Angell on Lim. 135, it is said that "the rule that items within six years draw after them other items beyond that period is by all the cases strictly confined to mutual accounts, or accounts between two parties, which show a reciprocity of dealing;" at page 137, that "there must be a mutual, or as it is expressed, an alternate course of dealing;" at page 156, that the account "must be current, and mutual or reciprocal;" and at page 160, that "the account must be a mutual or reciprocal one consisting of debts and credits."

It will thus be seen that the phrase "reciprocal demands" is not new in the Code, and that it really means no more than was before

meant by mutual accounts. It was introduced simply to settle definitely that there must be an account of mutual dealings — not an account of items only upon one side, or an account of items upon one side, upon which there had been simply payments not within six years upon the other side. It was intended to settle forever such questions as were raised in the cases of *Kimball v. Brown*, 7 Wend. 322; *Edmondstone v. Thomson*, 15 id. 554, and *Hallock v. Losee*, 1 Sandf. 220.

A payment generally upon an account within six years will take the whole account out of the statute, and it may be that it would make no difference whether the payment was in money or goods. But where goods are delivered by a debtor to his creditor who has an account against him, it will not be presumed that they were delivered in payment. Before they can be held to have been so delivered, there must be proof that it was so intended, and that both parties so understood it. An account of items upon one side and payments merely upon the other, is not a mutual account. The payments do not, in such case, enter into the account. They are at once applied and reduce the account. Such was the case of *Warren v. Sweeney*, 4 Nev. 101, to which our attention has been called. There an article of personal property was delivered by a debtor to his creditor, who had an account against him, expressly as payment.

Where there are mutual accounts between two persons, it is always the understanding that the account upon one side shall off-set that upon the other, and in law the debt due from the one to the other is only the balance left after the application in reduction of the accounts on the opposite side. In any form of action the recovery can only be for the balance. The very theory upon which this statute is based is that the credits are mutual, and that the account is permitted to run with the view of ultimate adjustment by a settlement and payment of the balance; and this theory is recognized in the statute, as it mentions an action "brought to recover a balance due" upon an account. The action need not be in form to recover such balance, if such be its purpose or legal effect. *Penniman v. Rotch*, 3 Metc. 216. In Angell on Limitations, 136, it is said: "Mutual accounts are made up of matters of set-off. There must be a mutual credit founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts. A natural equity arises when there is an existing debt on one

side which constitutes a ground of credit on the other ; or where there is an express or implied understanding, that mutual debts shall be be a satisfaction or set-off *pro tanto* between the parties." In *Abbott v. Keith*, 11 Vt. 525, REDFIELD, J., said: "In ordinary cases of mutual dealings no obligation is created in regard to each particular item, but only for the balance. And it is the constantly varying balance which is the debt. In *Hodge v. Manley*, 25 Vt. 210, it is said: "It has uniformly been held that distinct and different items of charge, in an open and mutual account, do not constitute separate claims ; but that the claim or debt is found in the balance of the account ; and that it is the balance only that constitutes the claim of the party to whom it is due." And in *Trueman v. Fenton*, 1 Smith's Lead. Cas., H. & W.'s Notes, 966, it is said : "When men deal with an express or implied agreement that what each sells or delivers shall, instead of giving rise to a demand payable at once, stand as a payment or off-set for what has been or may be received from the other, their liability will be limited to and depend upon the balance as finally disclosed, and the statute will not begin to run until the date of the last item."

Here the goods delivered on behalf of the defendant were delivered in the way contemplated by these authorities. It was plainly understood that they were to enter into the account between the parties, to be adjusted when plaintiff's account should be settled. It is quite absurd and unnatural to suppose that the defendant intended that these small items should be treated and considered technically as payments upon plaintiff's account. That would have been contrary to the ordinary and usual way of dealing in such cases. His direction was, that they be taken to the plaintiff to be applied upon his account. Applied how? By a credit in the ordinary way customary in such cases. The plaintiff was to credit them on the opposite side of his account, so that in any future settlement between the parties, the defendant could have the benefit of them. In legal effect they were sold to the plaintiff, the price of them to be credited on the account. It is true that the defendant could not have sued and recovered against the plaintiff for these items. But that was so simply because the plaintiff did not owe him any thing. But suppose the defendant had in the same way delivered goods to the plaintiff, until the balance was in his favor. Would it then be denied that he could have sued and recovered against the plaintiff? It has never been decided that in order to make an ac-

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count of mutual or reciprocal demands, each party must have, as claimed by the learned counsel for the appellant, a cause of action against the other for his side of the account. There is but one cause of action in such case, and that is for the balance. But were it not for the account on the opposite side, each party would have a cause of action for the items of his account.

In *Chambers v. Marks*, 25 Penn. St. 296, Judge BLACK, using language which might be applied to this case, said: "This was a suit for a balance on book account. The plaintiff's book showed several credits within six years, and it was proved, moreover, that the items of credit were delivered on account and credited agreeably to the defendant's request. The parties must settle as if the statute of limitations had never been passed." In *Norton v. Larco*, 30 Cal. 126, the defendant, being indebted to the plaintiffs on account, delivered to them an article of personal property, for which they gave him credit at a valuation agreed on; and it was held that thereby the account between the parties became a mutual, open and current account of reciprocal demands.

I will now notice, so far as deemed important, cases to which our attention was called on behalf of the defendant. In *Gold v. Whitcomb*, 14 Pick. 188, as stated in the head note, "a shopkeeper's account containing charges of articles sold to the defendants, some of them within six years before action brought, and also containing credits given more than six years before action brought, is not an account current or a mutual account, so as that the charges within the six years should draw the previous charges out of the operation of the statute of limitations." The case is but briefly reported, without any opinion of the court. It does not appear what the items of credit were. They must have been payments of money. If not, the case is opposed to the undoubted law. In *Lowber v. Smith*, 7 Barr. 381, the plaintiff, a powder manufacturer, sued the defendant to recover upon an account for powder, most of which was beyond six years, but in which he had credited the defendant for saltpetre and brimstone; and he claimed that these credits saved the whole account from the bar of the statute. Two witnesses, who were in the employ of the defendant, testified that they never knew of a purchase of powder by the defendant of the plaintiff, as an ordinary transaction, but that it was always an exchange for saltpetre and brimstone, or these articles were delivered to the plaintiff to be worked up and returned in powder. The trial judge held, as

matter of law, that these were mutual accounts between the parties. This was held error in the court of review, the decision there being that the evidence of the defendant tended to show that there was an exchange of one article for another, or in other words, a payment of one article by the delivery of another. The point decided was that an account is not rendered mutual by credits therein of payments either in money or property. But ROGERS, J., used language not sanctioned by authority, as follows: "A mutual account is when each has a demand or right of action against the other, as, for example, when A. and B. dealing together, A. sells B. an article of furniture, or any other commodity, and afterward B. sells A. property of the same or a different description; this constitutes a reciprocal demand, because A. and B. have a demand or right of action against each other;" and he said this is not so when the sale is only by one to the other, whether it is to be paid for in cash or in kind; and that the manner of payment could surely make no difference. This case is criticised in 1 Smith Lead. Cas., H. & W's. Notes, 967, and the reasoning of the judge who wrote the opinion is shown, I think, clearly to be unsound. The case of *Adams v. Carroll*, 85 Penn. St. 209, is one where all the items of the account were upon one side and only credits for money payments upon the other side; and it was properly held not to be a mutual account. It is in reference to such an account that the improper language is again used that "to constitute mutual accounts there must be mutual demands. Each party must have a demand or right of action against the other." These Pennsylvania decisions were made under a statute, the language of which is like that in the statute of James I, and the *dicta* which I have quoted are not sanctioned by any English or American authority construing that statute. Similar language is used by HOFFMAN, J., in *Peck v. N. Y. and Liverpool U. S. Mail S. S. Co.*, 5 Bosw. 226, a case where all the items were upon one side and simply money payments upon the other side.

Without referring to more authorities, I think it may safely be said that there is no decided case in this country or England which sustains the contention of the defendant; and that the phrase "reciprocal demands" has introduced no new element into our statute of limitations. It may be admitted that to constitute a mutual account of reciprocal demands, a defendant, when sued, must have an account against the plaintiff, which he can interpose as a set-off

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to the extent thereof. It is not needful, however, that each party shall have an independent cause of action against the other. The cause of action upon such an account is really in law for the balance due, and that party only is debtor against whom the balance is found, and that rule, as before stated, is recognized in the language of the statute. Suppose none of the plaintiff's account had been barred by the statute, and he had sued the defendant to recover the whole of it, ignoring the credits. Can it be doubted, that upon the facts disclosed in the evidence, he could have interposed his account for the butter and eggs as a set-off? To hold otherwise and sustain the contention of the defendant, would be to substantially nullify the statute of limitations in actions brought to recover upon accounts, as such accounts generally arise and exist under circumstances similar to those which appear here. That is, goods are delivered upon the one side to off-set or to be credited upon goods delivered upon the other side, the account being permitted to run for mutual convenience, and the balance to be paid by the party against whom, upon, final adjustment, it shall be found to exist.

I conclude, therefore, that the referee committed no error in his decision as to the statute of limitations; and I will now proceed to examine other exceptions to which our attention has been called.

[Omitting these.]

The judgment should be affirmed, with costs.

Judgment affirmed.

All concur, except CHURCH, C. J., not voting.

BRUCE V. FULTON NATIONAL BANK.

(79 N. Y. 154.)

Landlord and tenant — lease — covenant for renewal — when not binding on lessee.

In a lease formally and technically drawn, with an evident attention to details, and containing various covenants, some mutual and others binding only the one party or the other, there was a covenant on the part of the lessor for a new lease at the expiration of the term, but no corresponding covenant on the part of the lessee to accept it. *Held*, that the lessee was not bound to accept it.

ACTION to compel acceptance of renewal of lease. The opinion sufficiently states the case. The plaintiff had judgment at trial, which was reversed at General Term.

A. P. Man, for appellant. Even if the terms were less direct, and if the lease in form only bound the lessor to grant a renewal, the law would imply that the lessee was bound to accept it so long as no option was expressed. *Mayor v. Mabis*, 13 N. Y. 151; *Johnson v. Conger*, 14 Abb. 195; Shep. Touchstone, 53, 162; Co. Litt., 47 b; 1 Leon. 324; 1 Ch. Cas. 294; 2 Mod. 91; 1 Platt on Leases, 706; *Lord Frankfort v. Thorpe*, 2 Ball & B. 372; *Curry v. Stanley*, 1 H. & J. 487; *Butler v. Thomson*, 2 Otto, 412; *Pordage v. Cole*, 1 Wms. Saund. 319; *Hud. C. Co. v. Penn. Coal Co.*, 8 Wall. 276.

S. P. Nash, for respondent.

DANFORTH, J. There is no foundation for the appellant's argument. The parties to the agreement bound themselves by express covenants under "hand and seal," and the defendant is not shown to have broken any one of them. This conclusion was also reached by the trial court, and by the General Term, but the first rendered judgment for the plaintiff on the ground that from the words of certain express covenants on the part of the lessor an additional or correlative covenant on the defendant's part might be implied, and this may be so if the language used shows clearly that such covenant was intended. *Sampson v. Easterly*, 9 B. & C. 505; *Saltoun v. Houstoun*, 1 Bing. 433; *Earl of Shrewsbury v. Gould*, 2 B. & Ald. 487. But this construction cannot be permitted when it is apparent that the parties have themselves had the subject in mind and either one has withheld a promise in regard to it. That being so we can no more collect it from the words used than we can supply words, for in either case we should make the contract speak where the parties themselves were silent; and to do this the court has no power.

The agreement before us is very explicit. It was evidently prepared by a careful and experienced draftsman. Its subject is not new, nor is its form singular or unusual. It does not appear that anything was omitted which either party intended to provide for; "it is drawn technically in form and with obvious attention to details," and in such a case "a covenant cannot be implied in the

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absence of language tending to a conclusion that the covenant sought to be set up was intended." *Hudson Canal Co. v. Penn. Coal Co.*, 8 Wall. 276. This rule is cited with approbation by ALLEN, J., in the recent case of *Booth v. Cleveland Rolling Mill Co.*, 74 N. Y. 15, and it applies to and must control the case before us.

We find in the agreement some covenants binding the parties mutually; others only the lessor, and others still the lessee, — expressed in apt words without ambiguity or confusion. There is first a lease. By it the plaintiffs' testator as lessor "doth grant, demise," etc., "to the party of the second part," the defendant, certain described premises "from 12 o'clock at noon of the first day of May, 1856, for the term of twenty-one years at the annual rent of \$1,600, payable quarterly;" then a mutual covenant expressed by the words — "it is agreed," that in case of non-payment of rent when due, or default in other covenants the lessor may re-enter, etc.; next — the party of the second part, the lessee, "for himself, his successors or assigns, doth covenant to pay" to the lessor the yearly rent, also all taxes assessed, etc., on the demised premises during the term; then — "the party of the first part doth covenant and agree that on paying the rent and performing the covenants and agreements" in the lease "contained on the part of the party of the second part," he shall have quiet and peaceable possession of the premises during the term.

In all this there is no room for implication, and although from the word "demise" a covenant in law would be implied for quiet enjoyment, yet that covenant has been expressed. From the reservation of rent there is an implied covenant on the part of the lessee to pay the rent so reserved, yet a covenant to that end has been expressed; an omission to pay the rent, or a breach of any other covenant would warrant an entry by the lessor, yet it is mutually agreed that such shall be the effect of such omission. Not only then have technical words been used from which covenants in law would arise, *Hayes v. Bickerstaff*, Vaughan, 118, but as if to avoid the possibility of misconstruction, the covenants have also been written out. Following these provisions for a present lease, we find covenants in reference to a new or renewal lease, and on these the plaintiff rests his cause of action, viz.: "And the said parties of the first part do hereby covenant and agree, that if the said party of the second part, or his assigns, shall well and truly pay the rent hereby reserved, and keep and perform all the covenants herein con-

tained on the part and behalf of the said party of the second part, his successors or assigns, the said Dorothea A. L. Wolfe" (party of the first part), "her heirs or assigns, shall and will at the end or expiration of the term hereby granted, grant unto the said party of the second part a new lease of said premises for a further term of twenty-one years next ensuing from the time of the expiration of the term hereby granted, at such annual rent (not less than the rent hereby reserved) as shall then have been agreed upon by the parties or otherwise determined or ascertained as hereinafter provided." It is very plain that here is a covenant by the lessor only, — an agreement by her to give a new lease. There is none by the lessee to accept it. If we consider it in connection with the covenants which have preceded it, we see that it thus expresses the whole intention of the parties, for such is their language. It declares a covenant on the part of one to do an act. If it had been intended to bind both, or to impose a correlative obligation on the other, we should expect a clear statement to the effect, not only that one would give, but that the other would take a lease, or the use of words from which such an agreement must necessarily have been implied. It is not a present grant accepted by the other party, but a conditional promise or covenant to grant in the future a further term. It may be regarded as an offer for the benefit of the lessee, or as an inducement to him to build upon or improve the premises, giving assurance that if he did so he should enjoy the fruits of his expenditure for a longer period. *Abel v. Radclif*, 13 Johns. 298. This view is strengthened by the concession made in the printed points of the appellants' counsel. He says: "The circumstances of the lessee were peculiar, and the terms of the lease were exactly adapted to them and to the wants of the bank. * * * The bank was about to erect a costly banking-house upon this lot and its own adjoining lot on Fulton street." The lessee therefore would require the privilege of renewal, — the lessor be indifferent to it. If the term ended, the lot with the bank building would revert to the lessor. *Piggot v. Mason*, 1 Pai. 412-415. There is nothing to indicate that the lessor was desirous of continuing the lease, nor that the option was not given to the lessee to induce him to accept the original lease and improve the property. Besides, the lessor is bound to give a new lease if it was understood that the lessee was bound to accept; it would have been easier and more natural and in harmony with the structure of the other covenants

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regulating the engagements of the parties, to have entered at once into a lease for a longer period, — that this was not done would, of itself, warrant the conclusion that such result was not intended except at the option of the lessee. The learned counsel for the appellants, however, insists that the subsequent covenants relating to the adjustment of rent by appraisers bind both parties ; and this is so to a certain extent. They bind the lessor, provided the rent is fixed “at a sum not less” than that for the first term, and they bind the lessee absolutely. Here the option is with the lessor. He is not bound to accept a rent less than \$1,600. The lessee is bound, if he goes before the arbitrators, to abide by and perform their award. But there can be no arbitration until the lessor is called upon to give a new or renewal lease. When this event happens it may be that both parties become bound, but it is not necessary to decide that question, — it is enough that there can be no arbitration if there is no acceptance of a new lease, and no obligation to accept it can be implied from the subsequent provisions, for we have seen that there is an express covenant concerning it, binding on the lessor alone, and excluding the idea that the lessee is bound, and in such a case a covenant cannot be implied.

As we look further into the agreement we find other reasons for this construction of the covenants of the respective parties. There follows in substantially the same words as before, another covenant on the part of the lessor, for another, or second, renewal lease for twenty-one years, if the lessee pays his rent and performs his covenants, at such annual rent (not less than the rent reserved for the term of the first renewal) as shall have been agreed upon or otherwise determined as in the lease provided. Next — “it is further covenanted and agreed between the parties hereto, that at least ninety days previous to the last expiration of the last renewed or third term of twenty-one years, if said last term shall be granted,” the demised premises shall be valued and appraised as a vacant lot by arbitrators, “and the party of the second part shall purchase the lot at its appraised value,” and “the said Dorothea A. L. Wolfe will, on receiving such appraised value, grant and convey to the party of the second part the said land in fee simple.” There is nothing left for implication here; on the contrary there is a mutual covenant that the party of the second part will buy, and that the party of the first part will sell; so that we have throughout the instrument clearly and explicitly expressed the covenants and obliga-

tions of the several parties, and we may say of this contract as was said concerning a statute in *Edrick's* case: "The several inditing and framing of the different branches doth argue that the maker did intend a difference of the purview remedies." *Edrick's* case, pt. 5, fol. 118, 3 Co. From the different language used in the various covenants it is evident that the omission of words which would impose or indicate a mutual covenant was intentional, for it is apparent that the parties knew how to use terms applicable to the subject. It would therefore be a perversion of the plain reading of the agreement to impose upon the lessee the obligation which is assumed to lie at the foundation of this action, and it could only be done by a disregard of well-settled principles of law. In *Churchward v. Queen*, L. R., 1 Q. B. 173, the court refused to interpolate the obligation sought to be implied, Lord COCKBURN saying: "the court should take great care not to make the contract speak where it was intentionally silent; and above all that they do not make it speak entirely contrary to what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties;" and to the same effect, *Hudson Canal Co. v. Penn. Coal Co.*, 8 Wall. 276; *Maryland v. Railroad Co.*, 22 id. 105; *Booth v. Cleveland Rolling Mill Co.*, 74 N. Y. 15. A lease similar to the one in question came before the chancellor in 1829, and while the precise point now in hand was not presented, it is evident he regarded it optional with the lessee to renew. *Piggot v. Mason*, 1 Pai. 412-415. We have not overlooked the authorities referred to by the learned counsel for the appellant. They do not seem to us in point. In *Jackson v. Conger*, 14 Abb. 195, the action was for a renewal by the tenant against the landlord. The latter was clearly bound and upon sufficient consideration. The tenant elected to have the obligation fulfilled. Whether, except for that election, the lessee would have been bound, was not in question. In *Pordage v. Cole*, 1 Williams' Saund. 319, i, the decision rests on the word "agreed," which was said to be "the word of both parties," and so both were bound, but say the court, "it might be otherwise if the specialty had been the words of the defendant only and not the words of both parties." In *Butler v. Thomson*, 2 Otto, 412, the words were also the words of the buyer and seller. Neither case has therefore any application to the present where the covenant is in terms the covenant of one only. Nor do those cases aid the appellants which hold that any words in a deed showing an agreement to do a thing make

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a covenant (Com. Dig. Covenant, A, 2; Vaughn's R. 118; Rawle on Covenants, 365; Shepherd's Touchstone, 162; 1 Platt on Leases, 706, and cases there cited; *Curry v. Stanley*, Hayes & Jones, 487), for the very point is against them in that there are here no words to that effect. If the agreement was mutual throughout, the principle of these decisions, and especially *Pordage v. Cole*, would sustain the appellants, and we could then hold with the learned judge at Special Term "that what one party agreed to do, the other assented to and concurred in;" but if the construction already given by us to the agreement is correct, such is not its character. It is very probable that both parties contemplated that the bank would find it desirable and for its interest to continue business upon the demised premises for a term longer than that of the original lease, and if so they would desire the "right" or "privilege" or "option" of a renewal, but we can find no express covenant or any thing from which a covenant can be implied that they would remain or accept a renewal of the lease. We think therefore that the case was properly disposed of by the General Term and that its order should be affirmed, and judgment absolute ordered for the defendant.

Order affirmed and judgment accordingly.

All concur.

STEPHENS V. BOARD OF EDUCATION OF CITY OF BROOKLYN.

(79 N. Y. 188.)

Fraud — when recipient of moneys fraudulently obtained not answerable.

A member of a municipal board received moneys belonging to it, as its attorney, and appropriated them to his own use. Subsequently he procured moneys from the plaintiff on a forged mortgage, and with them paid his debt to the board, which received the same in good faith and in ignorance of the fraud upon the plaintiff. *Held*, that the plaintiff could not recover the same from the board.

ACTION for money had and received. The opinion states the case. The plaintiff had judgment below.

Winchester Britton, for appellant.

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Alonzo C. Farnham, for respondent. The money of the plaintiff having been virtually stolen from him, he could not be deprived of his title thereto, except by an innocent party for a valuable consideration. *Caussidiere v. Beers*, 2 Keyes, 198; *U. S. v. State Nat. Bk. Boston*, 6 Otto, 30; *Brower v. Peabody*, 3 Kern. 121; *Bayne v. U. S.*, 93 U. S. 642; *Wilson v. Smith*, 3 How. 763; *Bk. Metropolis v. N. E. Bk.*, 6 id. 212. The defendant is not a *bona fide* holder of the money, having received it in payment of a precedent debt. *Wood v. Robinson*, 22 N. Y. 564. Defendant not being a *bona fide* holder, as against the prior equity of the plaintiff, there is an implied privity of contract between the parties. *Rapelje v. Emery*, 2 Dall. 51, 54; *McDougal v. Walling*, 48 Barb. 364; *Pierce v. Crafts*, 12 Johns. 90, 94.

ANDREWS, J. There is no dispute as to the material facts. On and prior to the 18th of December, 1871, one Gill was a member of the board of education of the city of Brooklyn, and as attorney for said board received \$3,600.84, the money of the board, which he wrongfully converted and appropriated to his own use. Soon after the date mentioned he procured from the plaintiff on a mortgage forged by him on the property of a third person \$4,129.34 in a check of the plaintiff, which on the 21st of December, 1871, he deposited in a bank to his credit, and on the same day drew his own check on the bank in which the deposit was made, to the order of the board of education for the amount of the money fraudulently appropriated by him, and delivered the same to the board, and the board thereupon credited the check to Gill in discharge of his debt. The check was paid in due course, and the money received thereon was used by the board in its business. The plaintiff, about two months thereafter, ascertained that the mortgage received from Gill was a forgery, and then demanded from the defendant the money received from Gill. The defendant had no notice when it received the check from Gill of the fraud by which he obtained the money of the plaintiff, nor had it any information as to the source from which the money to his credit in the bank was derived. The first information which the defendant had of the facts in respect thereto was at the time of the demand made by the plaintiff, before referred to.

The question is presented whether, under these circumstances, the plaintiff can maintain an action to recover the money received

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by the defendant from Gill and applied in payment of the debt owing by him to the defendant. We are of opinion that the action will not lie. The money having been obtained by Gill from the plaintiff by fraud and felony, the former acquired no title thereto, and the plaintiff could recover it from Gill if found in his possession, or he could follow it into the hands of any person who received it from Gill without consideration or with notice of the fraud by which he obtained it. The money when deposited by Gill in the bank was still the money of the plaintiff. The bank was a mere depository, and while it so remained the plaintiff could have compelled the bank to restore the money to him as the rightful owner. *Tradesman's Bk. v. Merritt*, 1 Pai. 302; *Mechanics' Bk. v. Levy*, 3 id. 606; *Pennell v. Deffell*, 4 DeGex, M. & G. 372. But the bank, having paid it out on the check of Gill without notice of any defect in his title, was thereafter protected against any claim of the plaintiff therefor. The plaintiff, however, passing by the bank to whose possession the money first came from Gill, claims to recover of the defendant on the ground that the defendant, having received it from Gill in payment of an antecedent debt, cannot be permitted to retain it as against the plaintiff. No authority has been cited which sustains this position. The rule has been settled by a long line of cases, that money obtained by fraud or felony cannot be followed by the true owner into the hands of one who has received it *bona fide* and for a valuable consideration in due course of business. This, said Lord HOLT in 1 Salk. 126, is "by reason of the course of trade which creates a property in the assignee or bearer"—and in *Miller v. Race*, 4 Burr. 452, Lord MANSFIELD said: "The true reason is upon account of the currency of it; it cannot be recovered after it has passed into currency." No suspicion is cast upon the *bona fides* of the defendant. It received the money in the ordinary course of business, and for a good and valid consideration. The defendant had no connection with the fraud of Gill. He did not act or assume to act as the defendant's agent in the transaction with the plaintiff. The money was not obtained through or by means of his relation to the defendant. The position and rights of the parties are precisely the same as if Gill had not been a member of the board when the payment was made, or as if the debt which he paid had not originated in any violation of trust. It is said that the case is to be governed by the doctrine established in this State that an antecedent debt is not

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such a consideration as will cut off the equities of third parties in respect of negotiable securities obtained by fraud. But no case has been referred to where this doctrine has been applied to money received in good faith in payment of a debt. It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no ear-mark. The purchaser of a chattel or a chose in action may, by inquiry, in most cases, ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law, wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration. If the consideration is good as between the parties, it is good as to all the world. "Money," said Lord MANSFIELD, in *Miller v. Race*, before cited, "shall never be followed into the hands of a person who *bona fide* took it in the course of currency and in the way of his business." The question involved in this case was considered by JOHNSON, J., in *Justh v. Bank of Commonwealth*, 56 N. Y. 478, and he says: "In the absence of trust or agency I take the rule to be that it is only to the extent of the interest remaining in the party committing the fraud that money can be followed as against an innocent party having a lawful title founded upon consideration; and that if it has been paid in the ordinary course of business, either upon a new consideration or for an existing debt, the right of the party to follow the money is gone." The case perhaps did not call for a decision upon the point whether an existing debt was a sufficient consideration to uphold a title to money fraudulently obtained by a debtor, and by him paid to his creditor, as against the defrauded party; but we think it correctly declares the rule of law upon the subject. The case of *Cassidiere v. Beers*, 2 Keyes, 198, is entirely consistent with the rule here declared. The defendant in that case had no right to the money either against the agent from whom he obtained it or the

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principal to whom it belonged. The judgment should be reversed and a new trial ordered.

Judgment reversed.

All concur.

SCATTERGOOD V. WOOD.

(79 N. Y. 202.)

Evidence — opinions of experts as to quality.

In an action involving a breach of warranty that a cotton-gin was "equal in all respects to the best saw-gin then in use," the opinions of competent and experienced men are admissible on the question whether the cotton-gin was as warranted.

ACTION on contract. The opinion states the point. The defendant had judgment below.

J. E. Dewey, for appellant. It was error to receive in evidence the opinions and conclusions of defendants, and the expert witnesses called by them as to whether plaintiff's gin was equal to the best saw-gin then in use. *Steinbach v. La Fayette Ins. Co.*, 54 N. Y. 90, 96; 1 Phillips' Ev. 558, 560, 660; 1 Gr. Ev. (11th ed.) 605, § 440; 2 Ph. on Ins., § 2112; *Jameson v. Drinkald*, 12 Moore, 148; *Sills v. Brown*, 9 C. & P. 601; *Heroy v. Van Pelt*, 4 Bosw. 60, 62; *Norman v. Wells*, 17 Wend. 137, 161-164; *Lincoln v. Sar., etc., R. R. Co.*, 23 id. 425, 432-434; *Morehouse v. Mathews*, 2 Comst. 514; *Teerpenning v. Corn Ex. Ins. Co.*, 43 N. Y. 279; *Simons v. Monier*, 29 Barb. 420, 425; *Hudson v. Caryl*, 2 T. & C. 245; *Reynolds v. Robinson*, 64 N. Y. 595-596; *Harger v. Edmonds*, 4 Barb. 256-258; *Giles v. O'Toole*, id. 261-264; *Robinson v. Kinne*, 1 T. & C. 60, 62.

Samuel Wood, for respondents.

DANFORTH, J. The complaint alleges that by the contract the plaintiff "did warrant said cotton-gin to be equal in all respects to the best saw-gin then in use." The defendants reiterate this averment and the contract set out in the answer, and accepted by the plaintiff as correct, justifies the statement. The defendants set up a breach of this warranty as a defense to the plaintiff's action, and

the referee has found in favor of the defendants upon that issue. This finding is sustained by the General Term, and is obviously supported by evidence. It cannot therefore be reviewed in this court.

The learned counsel for the appellant, however, insists that the referee erred in receiving the opinions of witnesses upon the point referred to, but we think the evidence was properly admitted, and that the exception thereto must fail. In the first place, testimony of the same character had already been given by the plaintiff, and in the next place, the fact in issue could only be determined by a comparison of the merits of various machines with those of one constructed under the plaintiff's invention. There was an inquiry of the plaintiff's principal witness concerning the "condition of the cotton as to cleanliness as it came from different machines," and he says "from the plaintiff's gin it was cleaner and whiter," and from comparison he speaks of the greater production of one machine over the other, the quality of its work, economy of operation and facility of repair, in each instance giving an opinion. The plaintiff speaking as a witness, and testifying in his own behalf, goes a little farther. Referring to the contract he says at the time of making it: "I was acquainted with the various saw-gins then in use" * * * and being asked by his counsel, "How did the saw-gins compare with the American Needle Cotton Gin and Condenser" (the one in question) "at the time of the execution of the contract * * * in their operation and working?" Answered: "They were very inferior to the American Needle Cotton Gin and Condenser at the time of the execution of the contract." Similar testimony was given by Viall and True, both witnesses for the plaintiff. The example thus set was followed by the other side, and the plaintiff's objection is therefore unavailing. But we think the evidence was competent. The defendant's witnesses called to express an opinion were not merely experts, nor were they called upon to give an opinion upon a theoretical state of facts, but were asked for their judgment upon matters within their personal knowledge, happening under their own observation, and concerning which they were competent from education and experience to form and declare an opinion.

The general rule requires a witness to testify to facts, and not conclusions. Yet to this rule there are exceptions, and one is here presented. The parties by their contract required that the cotton-

 Bennett v. Garlock.

gin covered by the patent "should be equal in all respects to the best saw-gin then in use." To determine this question special knowledge was necessary, and this could be best acquired by experience in the use of that and other machines made for a like purpose. Indeed it is doubtful whether any other person could answer it. The invention or a machine made under it could be described, and its operation, as it affected the quantity and quality of the substance with which it was fed, stated to the referee; and all this was done, but it was also proper to take the opinion of competent persons as to its practical working and its comparative value.

The inquiry related to a matter which was not the subject of general knowledge, but depended on facts which from their nature it would be difficult if not impossible to place before the referee, and the statement embodied in the opinion given in evidence was itself a fact derived from peculiar knowledge and skill in the use of the various machines referred to. It was the result of professional knowledge and practical experience (*Emerson v. Lowell Gas Light Co.*, 6 Allen, 146), and the question raised by the warranty could hardly be answered except by the direct opinion of those who possessing this superior knowledge and experience had seen the machines in operation, or knew the merits of machines constructed under the plaintiff's patent and others then in use. Upon this ground, therefore, as well as the one first stated, I think the evidence objected to was properly received. Nor do I discover that the referee erred in any other ruling.

The judgment should therefore be affirmed.

Judgment affirmed.

All concur.

BENNETT V. GARLOCK.

(79 N. Y. 308.)

Trust—when estate of beneficiary defeated by negligence of trustee—adverses possession.

Lands were conveyed to trustees, their heirs and assigns, to sell sufficient to pay certain debts, and then to lease and support a certain beneficiary for life; the residuum to be held for the benefit of the grantor's heirs at the ex-

piration of the life estate ; reserving to the grantors power by appointment or will to direct where the residue should go ; the trustees in their discretion, upon request of the grantors, to sell and convey any portion. *Held*, that the trustees took the whole estate, and the beneficiaries only an equitable interest ; and that if by the acts or negligence of the trustees the estate of the trustees had been defeated by adverse possession, the interest of the remaindermen were also defeated.

ACTION of ejectment. The opinion states the case. The plaintiff had judgment at trial, which was reversed at General Term.

Henry A. Forster, for appellant.

Edward C. James, for respondent.

DANFORTH, J. Upon the facts found and conceded the plaintiff is entitled to recover the premises in question, unless they were held adversely for twenty years before the commencement of the action. This was the defense spread out in the answer and relied upon at the trial. The trial court found, and there was evidence to sustain the finding, that the person under whom the defendant claimed, on the 26th day of March, 1842, entered into possession of the premises under claim of title exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question, — that from that time there had been a continual occupation and possession of the same, and therefore the defendant had judgment. The question of fact thus found has not been disturbed by the General Term. The judgment was reversed upon the ground that the plaintiff's estate in the premises was a vested remainder created by deed from her ancestor to Messrs. Breese and Varick, trustees, dated May 24, 1808, but that her right of entry and possession did not accrue until 1871, and as the action was commenced in 1874 the statute was not a bar. The judgment to be given upon this appeal then depends upon the construction of that instrument. It was executed by Matthew and Martha Codd — Martha was the owner in fee of the premises conveyed, of which the land in controversy forms a part, Matthew was her husband, and the plaintiff their child and living, at the time of the execution of the deed. By that deed, the grantors, in consideration, as it is stated, of one dollar, and in order to effect the uses and trusts mentioned, did grant, release and convey unto the trustees above named, and their heirs and assigns, all the lands, etc., whereof

they, the said Matthew and Martha, were or either of them was seized or entitled to either in law or equity, in trust. First. To sell and dispose of so much of said lands, etc., as shall be sufficient to pay all debts and demands then subsisting against the grantors or either of them. Secondly. In trust as to the residue of said lands to lease, manage, cultivate and improve the same, in such manner and upon such terms and conditions as to the said trustees or the survivor of them, or the heirs or assigns of such survivor, shall from time to time seem proper and most for the interest and benefit of said Matthew and Martha or the survivor of them, the net profits and avails whereof are to be paid to Matthew during his life-time for the support and maintenance of Matthew and Martha and their children, and if Martha survives Matthew, then to her during her natural life-time for the maintenance of herself and children. Third. That the said trustees and the survivor of them, and the heirs and assigns of said survivor, shall hold all the residue of said lands over and above what may be sold as aforesaid for the payment of said debts, for the sole use, benefit and behoof of such persons as shall be the right heirs of them, the said Matthew and Martha, at the time of the death of the survivor of them; that is, to their children or grandchildren, or such other person as by the laws of the State of New York would be heir or heirs of the said Matthew and Martha Codd at the time of the death of the survivor of them if this deed had not been made. Reserving to the grantors, however, power by will or appointment to direct to whom upon the death of the grantors the trust estate or the residue of the lands should go. Fourth. Upon request made by the grantors the trustees were authorized in their discretion to sell and convey any portion of said lands "over and above what may be necessary for payment of debts." The validity of this instrument is not called in question by the plaintiff, nor could it be, nor can she be permitted to deny the existence of facts assumed by it, and in consequence of which the various trusts were created. For she introduced it in evidence as part of her case and as the foundation of her title. It was however before the Commission of Appeals, and it was by that court held that the trusts were valid, that the trustees took the legal title, and that Martha Codd had no title or interest in the premises, save the power of appointment by will. *Bain v. Mat-
tison*, 54 N. Y. 663. This power was never exercised. The defendant prevailed at the trial upon the ruling of the trial judge,

that the whole estate in law and equity was vested in the trustees, subject only to the execution of the trust, that the persons for whose benefit the trust was created took no interest or estate in the lands, but a right in equity to enforce the performance of the trust; and the judgment was reversed upon the theory that the trustees took no greater interest in the lands conveyed than the purposes of the trust required; that if any debts existed they must be presumed extinguished prior to 1871; that the other trust ceased with the death of Martha Codd, and that the plaintiff took a vested remainder in fee, which by virtue of the statute of uses was a legal estate and was by it executed at the death of Martha Codd. The existence of the general doctrine in regard to the extent of the estate of the trustees is not questioned, but its application to the case in hand is denied. First, it is to be noticed that the grant is unto Breese and Varick "and their heirs and assigns" of all the lands, etc., whereof the grantors "are or" whereof either of them is seized or entitled to either in law or equity, etc., "in trust for the uses above stated." By these words the trustees *prima facie* at least take an estate in fee and are invested with all the legal and equitable rights of the grantors (1 Perry on Trusts, § 315), and even without these words, if the trusts could not be fully executed except by the trustees taking an inheritance, their estate would be enlarged into a fee simple to enable them to carry out the intention of the grantors, "and this" says KENT, C. J., "has been frequently ruled in chancery. And the Court of Kings Bench, in the time of Lord MANSFIELD, made the same decision at law." *Fisher v. Fields*, 10 Johns. 504.

In the case before us, there is a trust to sell and a trust to lease; to perform these duties the trustees must have a fee — a less estate would not be sufficient to satisfy the purposes of the trust. 1 Perry on Trusts, § 315; *Collier v. Walters*, L. R., 17 Eq. Cas. 252.

Now what are the trusts here; the first is to sell so much of the lands as shall be sufficient to pay and satisfy all debts, dues and demands then subsisting against the grantors or either of them. By the terms of the deed it is made the duty of the trustees to sell,—for that purpose a fee is necessary — again, it is said that if "a fee be given in terms with trusts which by their nature extend over an indefinite time, the estate cannot be cut down." *Doe v. Davies*, 1 Q. B. 430. Here no time is fixed for the payment of the debts provided for, and the case in that respect is like *Collier v. Walters*,

supra. It is plain that no precise period for the continuation of the trust is mentioned, nor could it have been ascertained at the time of the execution of this deed. Again, this power extends to the whole land conveyed and is not confined to any particular piece or parcel of it. The force of the argument then would not be weakened if we knew that the debts could be paid from the proceeds of a small portion, and that the whole of the land would not be required for that purpose, the question being what estate was conferred upon the trustees; whatever estate was conferred must vest as to the whole. In *Collier v. Walters, supra*, it is stated by the master of the rolls, as a rule collected from all the authorities, "that you cannot cut down the estate in fee simple unless you can point out on the face of the will what less estate the trustees take." That has not been done in this case.

In *Nichol v. Walworth*, 4 Den. 385, JEWETT, J., says: "The rule at common law as well as by statute is that the trustee takes that quantity of interest only which the purposes of the trust require and the instrument creating it permits. The legal estate is in the trustee so long as the execution of the trust requires it, and no longer, and then it vests in the person beneficially entitled." And this is cited by the respondent in support of the doctrine on which the judgment of the General Term was placed. The grant in that case was unlike the one before us—there were no words of inheritance—it was unaccompanied by any power to sell or of management on the part of the trustee. The trust was simply to receive the rents, issues and profits of the land and apply the same to the support of a person named, upon the express condition that the same should not be sold during her life, but held for the purpose stated, and the grantor added, after her death "I give, grant and convey the said premises to my natural daughter Mary," etc. There the trustee took an estate for the life of the person named in trust for her, and the limitation in remainder after her death was directly to Mary in fee.

Norton v. Norton, 2 Sandf. 296, also cited by respondent, is not in conflict with these views. The plaintiff claimed a life estate in the premises as tenant by the curtesy. This was denied, and upon the hearing it appeared that J. L. N. had theretofore granted unto one Hannah Clinton, her executors, etc., all the estate which as husband of Sarah Norton he had in her land in trust for Sarah, giving her power through her said trustee to dispose of the property,

collect rents, etc. The questions before the court turned on the effect of this conveyance. It was held that it did not convey the fee, the court saying: "The purpose of this trust was first for Mrs. Norton and second to empower her through her trustee to dispose of the property, manage it, and collect the rents; the first object and all of the second, except the power of disposal, were attainable by a trust which should cease on her death. For those objects therefore the estate of the trustee cannot be deemed to have extended beyond her life; the power of disposing of the property is limited to her alone; there is no limitation in favor of her heirs or devisees, nor any language from which an intention is to be inferred that others were to execute the power." It was held that the trust ceased on Mrs. Norton's death, and that the plaintiff had a legal estate as tenant by the curtesy. There were no words of inheritance; none from which an intent could be inferred of a greater estate than for the life of Mrs. Norton, nor any object to be accomplished which required it. In the case before us it is quite otherwise. It is claimed by the respondent that the estate of the trustees ceased when the purposes of the trust were accomplished, and assuming that the debts were paid, the death of Mrs. Codd put an end to the trust estate. This must be so, but then and for nearly thirty years before that time, the trustees, holders of the legal estate, had neglected to assert their title. As against them the defendant had a good title by adverse possession. *Perry on Trusts*, § 858; *Hill on Trustees*, *267; *Lewellen v. Mackworth*, 2 Eq. Cas. Arb. 579; *Hounden v. Lord Annesley*, 2 S. & Lef. 629; *Pentland v. Stokes*, 2 Ball & B. 175.

What estate has the plaintiff? Not a legal estate in fee, for as we have seen the whole legal estate vested in Breese and Varick as trustees. Martha Codd had an equitable estate for life, her children, of whom the plaintiff was one, an equitable remainder liable to be defeated by dying before their mother, or in part by after-born children who at the time of the mother's death should be living. The estate or interest cannot be more than this. Although the plaintiff was living when the trust was created, she is not named in the deed nor is she referred to as one then in existence. There is even no provision made for children then *in esse*. The beneficiaries are those who as child or grandchild, or those failing, others, are entitled to inherit who shall be living when the mother dies. The plaintiff happens to be one of them; and for that reason.

and not because she was living at the time of the execution of the deed, she takes an interest, which for the reason above stated can be an equitable one merely. *Wood's* case in the Supreme Court under the name of *Wood v. Mather*, 28 Barb. 473, and in the Court of Appeals as *Anderson v. Mather*, 44 N. Y. 249, sustains this construction.

The defense, good against the trustees, is good against the plaintiff also. They had the whole legal and equitable estate; she an equitable interest only upon the strength of which she could enforce the performance of the trust in equity. At the death of her mother, Martha Codd, the plaintiff became entitled to the receipt of the rents and profits and to the actual possession of the land then in the hands of the trustees; she could have no more. Whatever way it was conveyed to her, by the trustees themselves or by force of the statute, she took subject to the acts of the trustees, and became bound and affected by their affirmative acts, and by their neglects. If by their neglect or consent an estate had been acquired by the defendant, or he had obtained an advantage which prevented the trustees from asserting their title, the plaintiff standing in their place is equally estopped and prevented. In *Jackson v. Johnson*, 5 Cow. 74, the grant was to A. and his heirs in trust for the children of B. SAVAGE, C. J., says: "A. was authorized to sell the lands to reimburse advances which it was contemplated he would make, and in fact did make. He took the legal estate and the heirs only an equitable one." * * * His (A.'s) acts were valid and binding upon those heirs, and when he conveyed to them the legal estate they took it subject to such equitable interests as the defendant and others had acquired in the lands by virtue of the acts of the trustees. In *Smilie v. Biffle* 2 Barr. 52, the court say: "Where *cestui que trust* and trustee are both out of possession for the time limited, the party in possession has a good bar against both." If for any reason the estate of the trustees had been void at its creation, the remainder in the plaintiff, however it may have been termed, would have been void also; for it is limited upon the trust estate. So if the estate of the trustees is defeated in any way, or if their right of action for its possession is barred, the remainder must be defeated and the plaintiff's right barred, because it rests upon the same title.

But the plaintiff insists that this does not affect her, and as the foundation of her claim asserts, first, that on the execution of the

trust deed she became vested with a legal estate in remainder limited by way of use, and second, that the statute did not run against her right of action until by her mother's death, she was entitled to possession, and if this is so she is entitled to recover. But how can that be? That the trustees were clothed by appropriate words with all the legal and equitable interests of Matthew and Martha Codd, cannot be denied, and with the language the purpose of the trust concurs. They may sell, of course they may give a good title as full and perfect as that possessed by the grantors. *Brewster v. Striker*, 2 Comst. 19. A title during the life of Martha Codd would clearly not be such an one. A title subject to a vested remainder in fee would be any thing but unincumbered, and yet if the plaintiff is right, such a title is the only one the trustees could give, for that remainder extended to all the lands referred to in the deed. And nothing short of this will aid the plaintiff; for if she did not take a vested remainder at the time of the execution of the deed she would afterward stand in the place of the trustees and be subject to their acts with no better right of action than they had. There is no ground on which the plaintiff can recover.

The order of the General Term should be reversed, and the judgment of the Special Term affirmed.

Order reversed and judgment affirmed.

All concur, except RAPALLO, J., dissenting, and EARL, J., taking no part.

PIERSON V. PEOPLE.

(79 N. Y. 494.)

Criminal law — withdrawal of prisoner's challenge — evidence — prohibition of physician's testimony.

On a trial for murder the prisoner, having challenged the array, may withdraw the challenge, and thus waive the irregularity.

On a trial for murder, by poison, a physician is not prohibited from testifying to the results of his examination of the deceased, and to the statements of the deceased during such examination, while attending him in his last illness.*

* See *Campau v. North* (30 Mich. 606), 33 Am. Rep. 433, and note, p. 435.

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CONVICTION of murder. The opinion states the case.

James Wood, for plaintiff in error. The prisoner could not lawfully withdraw his challenge to the array after it had been sustained by the court. *Lord Dacres' case*, Kelynge, 59; 1 Woodeson, 346; 3 Inst. 30; *People v. Cancemi*, 7 Abb. 271; 18 N. Y. 128; *Rex v. Williams*, Russ. & Ryan, 224; *Pfeiffer v. Comm.*, 3 Harris, 468; *Rex v. Wolf*, 1 Chit. 401; 18 Eng. C. L. 115; *Comm. v. Canfield*, Thatcher Cr. Cas. 510; *Stephens v. People*, 19 N. Y. 549; *McCloskey v. People*, 5 Park. Cr. 308; 1 Sellon Pr. 477; *People v. McKay*, 18 Johns. 212; *State v. Williams*, 1 Rich. 188; *People v. Moneghan*, 1 Park. Cr. 570. The court erred in overruling the objection to the facts testified to by the physician Coe as privileged communications. 2 R. S. 406, m. p. §§ 72, 73; Code of Civ. Proc., §§ 833, 834, 835, 836; *People v. Stout*, 3 Park. Cr. 670; *Wilson v. Rastall*, 4 T. R. 753; *Rex v. Withers*, 2 Camp. 578; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 592; *Parker v. Carter*, 4 Mumf. 273; Greenl. Ev. 278; 1 Edw. Ch. 439; 4 Pai. 460; 14 Wend. 637, 641; *Eddington v. Mut. Life Ins. Co. of New York*, 5 Hun, 1; 67 N. Y. 185; *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; *Jackson v. Lewis*, 17 Johns. 475; *McClusky v. Cromwell*, 11 N. Y. 601; *Newell v. People*, 7 id. 97.

D. W. Noyes, for defendant in error.

EARL, J. William Pierson, the prisoner, was indicted in Livingston county for murder, in causing the death by poison of Leaman B. Withey, in February, 1877. He was tried at the Oyer and Terminer of that county in February, 1878, and was convicted and sentenced to be hung. His conviction was affirmed at the General Term of the Supreme Court. He has now brought his case into this court by writ of error, and seeks to have his conviction reversed for several errors which have been ably presented for our consideration by his counsel.

[Omitting an immaterial statement.]

When the case was moved for trial the prisoner challenged the array of jurors, and alleged as a ground of challenge that the second box was not kept by the clerk and brought into court at the time of drawing the jurors. The district-attorney took issue upon the challenge, and upon the trial of such issue the facts appeared as

above stated, and the court sustained the challenge. The prisoner thereupon withdrew his challenge, and a jury was then impanelled and the trial proceeded. It is now claimed by the learned counsel for the prisoner that the challenge was properly sustained, and that after it was sustained the prisoner could not lawfully withdraw it and go to trial before a jury thus irregularly drawn.

It is not important for us to determine whether the challenge was properly sustained, because whether it was or not we are of opinion that the prisoner could withdraw his challenge and waive any irregularity which existed in this case. The maxim *quilibet potest renunciare juri pro se introducto* is of quite general application. One may waive constitutional provisions intended for his benefit. *Lee v. Tillotson*, 24 Wend. 337; *Van Hook v. Whitlock*, 26 id. 43; *People v. Murray*, 5 Hill, 468; *Baker v. Braman*, 6 id. 47; *Embury v. Conner*, 3 N. Y. 511. A prisoner may waive a trial by jury and plead guilty; he may waive a plea of *autrefois acquit* by not interposing it or withdrawing it; he may waive or withdraw a challenge to a juror; he could waive his right to have a challenge of a juror for favor tried by triers, and consent that it be tried by the court; he may waive objections to improper or incompetent evidence; in a court of special sessions he may waive a trial by jury and be tried by the court; he may waive a challenge to the array of jurors by a challenge to the polls; he could consent to the separation of the jury during the trial, when such separation, without such consent, would be ground of error. A man cannot legally be indicted and tried as accessory to a felony until the principal be convicted, and yet if he go to trial without insisting on the objection he is held to have waived it. *People v. McKay*, 18 Johns. 212; *People v. Mather*, 4 Wend. 229, 245, 246; 21 Am. Dec. 122; *People v. Rathbun*, 21 Wend. 509, 542; *Stephens v. People*, 19 N. Y. 549, 563; *Gardiner v. People*, 6 Park. Cr. 155. In *People v. Rathbun*, COWEN, J., said: "The prisoner may even waive his right to a trial at the hands of a jury on the merits by pleading guilty. Having this power, no one will pretend that he cannot consent to any thing less. He may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court." In *Canciani v. People*, 18 N. Y. 128, a case very much relied upon by the counsel for the prisoner, twelve jurors were empanelled for the trial, and during the trial the prisoner stipulated that one juror might be withdrawn, and that the trial should proceed with eleven jurors.

It did so proceed, and the prisoner was convicted. It was held that the conviction was illegal. The decision was based upon two grounds: that the parties could not by consent alter the substantial constitution of the court; and that the State has an interest in the preservation of the liberties and lives of its citizens, and will not allow them to be taken away without due process of law, even by the consent of those accused of crime. STRONG, J., said: "The substantial constitution of the legal tribunal and the fundamental mode of its proceeding are not within the power of the parties;" that "the State, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away 'without due process of law;'" and he further said that the right to affect by consent the conduct of a case in a criminal prosecution "should not be permitted to extend so far as to work radical changes in great and leading provisions as to the organization of the tribunals or the mode of proceeding prescribed by the Constitution and the laws. Effect may justly and safely be given to such consent in many particulars, and the law does in respect to various matters regard and act upon it as valid. Objections to jurors may be waived; the court may be substituted for triers to dispose of challenges to jurors; secondary instead of primary evidence may be received, admissions of facts allowed; and in similar particulars as well as in relation to mere formal proceedings generally consent will render valid what without it would be erroneous."

That case is no authority for the contention of the prisoner's counsel in this case. Here there was due process of law. The prisoner was tried by a common-law jury of twelve. The jurors all possessed the qualifications prescribed by statute, and they were selected and returned for jury service by the proper officials in the mode required by statute. The consent evinced by the withdrawal of the challenge did not affect the substantial constitution of the tribunal before which the prisoner was tried. The objects of all the jury laws are to distribute the burden of jury service among all those liable to such service and to secure impartial jurors of the requisite qualifications. To secure the first object lists of jurors are required to be made and returned to the county clerk in each county every three years. The names thus returned are required to be put into a box, from which jurors for any term of court are required to be drawn, and when a juror has once attended and served, his name is

not to be returned to that box, but is to be placed in another box, to the end that he may not be drawn for service again until all have been drawn from the box first named. Code, § 1051. The second object is attained by requiring that only persons of the prescribed qualifications shall be returned for jurors, and that they shall be chosen by lot. Now all these substantial provisions were observed in this case. The jurors upon the array were all persons who had been returned as such by the proper officials. They all possessed the statutory qualifications, and they were chosen by lot. When these substantial conditions exist, the rest must generally be matter of form, which can be arranged or waived by consent, tacit or expressed. Here the only irregularity alleged is that the second box was not kept or brought into court. The fact that it was not kept was not known to the court at the time it made the order designating the box from which the jurors were to be drawn. In the exercise of its discretion, and to carry out the manifest purpose of the law, it ordered the jurors to be drawn from the first box. A court would not be expected to order jurors to be drawn from the second box, containing the names of those who had once served, so long as there were sufficient names in the first box. It cannot therefore be inferred, if all the boxes had been kept and brought into court and the orders then made, that different jurors would have been drawn and summoned from those who were actually drawn and summoned. But even if it could be thus inferred, it cannot be denied that the persons impanelled to try the prisoner were jurors made so in the mode prescribed by law and possessing lawful qualifications. If therefore there was any irregularity which would be ground of error, it was merely formal, affecting no public interest, trenching upon no public policy; and to hold that it could not be waived would be without precedent and against reason.

While Withey was sick, suffering from the poison which is supposed to have been administered to him, Dr. Coe, a practicing physician, was called to see him by the prisoner; and he examined him and prescribed for him. On the trial he was called as a witness for the people, and this question was put to him: "State the condition in which you found him at that time, both from your own observation and from what he told you?" The prisoner's counsel objected to this question on the ground that the information which the witness obtained was obtained as a physician, and that he had no right to disclose it; that the evidence offered was prohibited by the statute.

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The court overruled the objection, and the witness answered, stating the symptoms and condition of Withey, as he found them from an examination then openly made in the presence of Withey's wife and the prisoner, and as he also learned them from Withey, his wife and the prisoner. There was nothing of a confidential nature in any thing he learned or that was disclosed to him. The symptoms and condition were such as might be expected to be present in a case of arsenical poisoning. It is now claimed that the court erred in allowing this evidence, and the statute (§ 834 of the Code) is invoked to uphold the claim. That section is as follows: "A person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." This provision of the Code is a substantial re-enactment of a provision contained in the Revised Statutes. 2 R. S. 406. Such evidence was not prohibited at common law. The design of the provision was to place the information of a physician, obtained from his patient in a professional way, substantially on the same footing with the information obtained by an attorney professionally of his client's affair. The purpose was to enable a patient to make such disclosures to his physician as to his ailments, under the seal of confidence, as would enable the physician intelligently to prescribe for him; to invite confidence between physician and patient, and to prevent a breach thereof. *Edington v. Mut. Life Ins. Co.*, 67 N. Y. 185; *Edington v. Aetna Life Ins. Co.*, 77 id. 564.

There has been considerable difficulty in construing this statute, and yet it has not been under consideration in many reported cases. It was more fully considered in the *Edington* case than in any other or all others. It may be so literally construed as to work great mischief, and yet its scope may be so limited by the courts as to subserve the beneficial ends designed without blocking the way of justice. It could not have been designed to shut out such evidence as was here received, and thus to protect the murderer rather than to shield the memory of his victim. If the construction of the statute contended for by the prisoner's counsel must prevail, it will be extremely difficult, if not impossible, in most cases of murder by poisoning, to convict the murderer. Undoubtedly such evidence has been generally received in this class of cases, and it has not

been understood among lawyers and judges to be within the prohibition of the statute.

How then must this statute be construed? The office of construction is to get a meaning out of the language used, if possible. If the words used are clear and unmistakable in their meaning, and their force cannot be limited by a consideration of the whole scope of the statute or the manifest purpose of the legislature, they must have full effect. But in endeavoring to understand the meaning of words used, much aid is received from a consideration of the mischief to be remedied or object to be gained by the statute. By such consideration, words otherwise far-reaching in their scope may be limited. Statutes are always to be so construed, if they can be, that they may have reasonable effect, agreeably to the intent of the legislature; and it is always to be presumed that the legislature has intended the most reasonable and beneficial construction of its acts. Such construction of a statute should be adopted as appears most reasonable and best suited to accomplish the objects of the statute; and where any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the legislature to avoid such consequence. A construction which will be necessarily productive of practical inconvenience to the community is to be rejected, unless the language of the law-giver is so plain as not to admit of a different construction: *Potter's Dwarries on Statutes*, 202.

The plain purpose of this statute, as in substance before stated, was to enable a patient to make known his condition to his physician without the danger of any disclosure by him which would annoy the feelings, damage the character, or impair the standing of the patient while living, or disgrace his memory when dead. It could have no other purpose. But we do not think it expedient, at this time, to endeavor to lay down any general rule applicable to all cases, limiting the apparent scope of this statute. We are quite satisfied with the reasoning upon it of Judge TALCOTT, in his able opinion delivered at the General Term of the Supreme Court, and we agree with him "that the purpose for which the aid of this statute is invoked, in this case, is so utterly foreign to the purposes and objects of the act, and so diametrically opposed to any intention which the legislature can be supposed to have had in the enactment, so contrary to and inconsistent with its spirit, which most clearly intended to protect the patient and not to shield one who is

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charged with his murder, that in such a case the statute is not to be so construed as to be used as a weapon of defense to the party so charged, instead of a protection to his victim." This objection was, therefore, not well taken.

[Omitting other points.]

The judgment should be affirmed.

Judgment affirmed.

All concur, except RAPALLO, J., not voting.

 PRATT V. SHORT.

(79 N. Y. 437.)

Corporation — discounting commercial paper ultra vires — may recover money loaned.

A corporation which has discounted commercial paper without any statutory power to do so may recover the money thus loaned, although the securities are void.

ACTION for money loaned. The opinion states the case. The plaintiff had judgment at trial, which was reversed at General Term.

Daniel Pratt, for appellants.

Geo. N. Kennedy, for respondents. The defendants were not liable for money had and received, or lent and advanced upon the discount of the note. *Utica Ins. Co. v. Scott*, 19 Johns, 1; *Utica Ins. Co. v. Cadwell*, 3 Wend., 296; *Utica Ins. Co. v. Bloodgood*, 4 id., 652; *Utica Ins. Co. v. Kip*, 8 Cow., 20; *New Hope Del. Bdg. Co. v. Poughkeepsie Silk Co.*, 25 Wend., 650; *Curtis v. Leavitt*, 15 N. Y., 98; *Tracy v. Talmage*, 14 id., 189; *Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co. of N. Y.*, 7 Wend., 31; *Bissell v. Mich. South. R. R. Co.*, 22 N. Y., 265; Com. on Contracts, 30; *Bank of Salina v. Alvord*, 31 N. Y., 474; *N. Y. Firemen Ins. Co. v. Ely*, 2 Cow., 678; 22 N. Y., 265.

ANDREWS, J. The People's Safe Deposit and Savings Institution, a corporation created by chapter 816 of the Laws of 1868, in

August, 1872, upon the application of defendants, composing the firm of H. W. Short & Co., discounted a note made by one Alice Van Cleek, for \$1,900, payable to the order of H. W. Short & Co. seventy days after its date, and indorsed by the payees, who received the proceeds of the discount. The note was taken by H. W. Short & Co. upon a debt owing by the maker to the payees. It was not paid at maturity, and was duly protested. The Safe Deposit Company in September, 1872, became bankrupt, and the plaintiffs were appointed assignees in bankruptcy of the insolvent corporation. This action is brought by the plaintiffs as such assignees against the defendants, and in their complaint they allege three causes of action: *first*, a cause of action against the defendants as indorsers of the note referred to; *second*, for money lent and advanced by the Safe Deposit Company to the defendants upon the security of the note, and *third*, for money had and received by them, to and for the use of the corporation.

It is admitted that the note has not been paid, and that the Safe Deposit Company has never been re-imbursed in any way for the money advanced to the defendants on the discount of the paper. When called upon to pay the note, according to the terms of their engagement, their sole defense is that the Safe Deposit Company was prohibited by law from discounting notes, or loaning its funds on personal security, and that having acquired title to the note through this illegal transaction the contract of indorsement is void. In answer to the claim for the repayment of the money it is insisted that the loan or advance of the money, and the taking of the note with the indorsement as security therefor, constituted one single and indivisible act, incapable of separation, and that the transaction as a whole falls under the condemnation of the law, so that neither the corporation nor its assignees in bankruptcy have a remedy either upon the security, or to recover back the money advanced upon the void paper.

[Omitting the discussion of the power of the corporation to discount.]

I have no difficulty, therefore, in reaching the conclusion that the discount by the corporation of the note in question was unlawful, and upon general principles of law applicable to the subject, as well as by the terms of the restraining act, the security taken by the company was void, and furnishes no ground of action. *Thalimer v. Brinkerhoff*, 20 Johns. 386; *N. Y. Firemen's Ins. Co. v.*

Ely, supra; *Bank of Salina v. Alvord*, 31 N. Y. 474; *Crocker v. Whitney*, 71 id. 161; *N. Y. State Loan and Trust Co. v. Hehner*, 77 id. *supra*.

It is claimed, however, that the plaintiffs as representatives of the insolvent corporation, notwithstanding the invalidity of the note, are entitled to recover the money received by the defendants upon the void security, and this presents the only remaining question in the case.

It is no doubt the general rule of law that no right of action can spring out of an illegal contract. And the rule that an illegal contract cannot be enforced applies as well to contracts *malum prohibitum* as to contracts *malum in se*. But it does not necessarily follow that all the consequences attending a contract which is contrary to public morals or founded on an immoral consideration attend and affect a contract *malum prohibitum* merely. The law in the former case will not undertake to relieve parties from the position in which they have placed themselves, or to adjust the equities between them. But in the latter case, while the law will not enforce the prohibited contract, it will take notice of the circumstances, and if justice and equity require a restoration of money or property received by either party thereunder, it will give, and in many cases has given relief. So also a prohibitory statute may itself point out the consequences of its violation, and if on a consideration of the whole statute it appears that the legislature intended to define such consequences and to exclude any other penalty or forfeiture than such as is declared in the statute itself, no other will be enforced, and if an action can be maintained on the transaction of which the prohibited transaction was a part, without sanctioning the illegality, such action will be entertained. The case of *Robinson v. Bland*, 2 Burr. 1077, is a leading case illustrating this principle. The statute, 9 Anne, chap. 14, declared that "all notes, bills, bonds, judgments, mortgages or other securities for money won or lent at play shall be void," etc. The declaration counted upon a bill of exchange drawn by the defendant's intestate, and also contained the money counts. The bill was given in part for money won at play by the plaintiff of the defendant's intestate, and in part for money lent at play to the intestate. The defendant interposed the statute as a bar to the recovery. The defense was allowed as to money won, but was overruled as to the money lent. Lord MANSFIELD said: "As to the money won, we

think it cannot be recovered ; as to the money lent, the plaintiff is entitled to it." Mr. Justice DENISON said : "There is a distinction between the contract and the security." Mr. Justice WILMOT, speaking of the claim for money lent, said : "The contract may be good though the security be void, and I think the contract is good though the security is void by the statute of 9 Anne."

In determining whether the legislature intended in the charter in question that a violation by the company of the restriction as to investments contained in the eleventh section should not only render the unauthorized security void, but also work a forfeiture of the money loaned thereon, it is important to consider the purpose and object which the legislature had in view in making the restriction. Plainly the main object was to secure the fund of depositors against loss by insecure and hazardous investments. The State, by the charter, held out the company as a savings bank. The legislature well understood that it would be made the custodian of the savings of individuals dealing with the corporation, and it was eminently wise and just that the bank should be so restricted in respect to the character of the investment it should make as to afford reasonable assurance that the trust would be safely administered.

The risk of losing the benefit of securities taken in violation of the charter would naturally induce care on the part of the managers of the corporation in confining investments to the authorized securities, but to hold that the illegal action of the directors in investing in unauthorized securities not only debarred a recovery thereon but also put the fund itself thus illegally used, and which the restriction was intended to protect, beyond the power of reclamation from the hands of the borrower, would seem to contravene rather than support the policy upon which the restriction was founded.

The effect of the restraining act upon contracts made in violation of its provisions, was considered in a series of cases, known as the Utica insurance cases, commencing with the case of *Utica Insurance Co. v. Scott*, 19 Johns. 1. In these cases the company had, in violation of the restraining act, carried on the business of discounting paper, exercising in respect thereto ordinary banking power. And it was held that the securities taken on such discounts were void, but that the money loaned could be recovered. The court, in the case in Johnson, say : "the lending money is not declared to be void, and therefore whenever money has been lent it

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may be recovered, although the security itself is void," citing, among other authorities, the case of *Robinson v. Bland*, *supra*. This distinction was adopted and followed in several subsequent cases. *Utica Ins. Co. v. Kip*, 8 Cow., 20; *Utica Ins. Co. v. Cadwell*, 3 Wend., 296, and *Utica Ins. Co. v. Bloodgood*, 4 id., 652. These cases have been criticised, but have never been overruled. *Mercin v. People*, 25 Wend., 64; *Tracy v. Talmage*, 14 N. Y., 189; *Curtis v. Leavitt*, 15 id. 97. The first restraining act was passed in 1804, and was re-enacted in 1813, 2 R. L. 234, and extended in 1818. Laws 1818, chap. 236. The object of these enactments, as shown by SAVAGE, C. J., in *New York Fireman's Ins. Co. v. Ely*, *supra*, was to protect the chartered banks in the monopoly of banking, and to exclude other corporations, associations or individuals from conducting a banking business in either department, of issue, deposit or discount. But the State subsequently departed very widely from this policy. In 1837 the legislature repealed the restriction before existing, preventing individuals or unincorporated associations from keeping offices of deposit, and discount. Laws of 1837, chap. 20. This act, as was said by COMSTOCK, J., in *Curtis v. Leavitt*, 15 N. Y. 97, reduced banking to a private business, except in the department of creating a circulating medium. After this repeal any person or association, except incorporated companies, could conduct the business of receiving deposits and making discounts. In 1838 the legislature, by the general banking law, opened the whole franchise of banking to any person or association of persons, subject only to the condition of complying with the provisions of the act.

It will be seen, from this reference to the law, that the policy upon which the restraining acts were passed, viz., the securing of the monopoly of banking to special favorites of the legislature, has been abandoned. Any individual, or association of individuals, may now conduct the business of receiving deposits and discounting commercial paper. The restraint continues as to incorporated companies not authorized by their charter to conduct the business. The only public policy upon which this remaining restriction upon incorporated companies against discounting paper seems now to rest, is that of restraining corporations from exercising powers not granted by their charters. The Utica insurance cases have stood as the law of the State for more than forty years. They gave a construction to the restraining laws which has never been reversed.

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The court is not called upon at this late day, in a case similar in principle, and involving the construction of the same statute, to reconsider the grounds of those decisions, especially when there remains but a remnant of the policy upon which they were founded, and when the business of discounting notes has been made lawful as to all the world except corporations not authorized by their charters to conduct it. In view of the special language of the restraining act, and the specification of the consequences which should follow the unlawful discount of commercial paper, there is great force in the suggestion that the legislature regarded the particular penalty imposed, and the remedy by *quo warranto* or by an action in equity to restrain the exercise by a corporation of unauthorized powers, as a sufficient protection against corporations, or individuals unlawfully engaging in the business of discounting paper, and that it was not intended that they should also forfeit all claim to money loaned or advanced upon the prohibited security.

The justice of the particular case before us calls for no departure from these decisions. If the defendants avoid their indorsement it is the plainest equity that they shall restore the money which they received on the faith of it.

The judgment of the General Term should be reversed, and the judgment of the Special Term affirmed, with costs.

Judgment accordingly.

All concur

UNION HOTEL COMPANY V. HERSEE.

(79 N. Y. 454.)

Contract — subscription — "citizen."

A subscription was made on condition that a certain sum be subscribed by the citizens of B. One of the subscribers was domiciled in A., but boarded, did business, and spent nearly all his time in B. *Held*, that he was a citizen of B. within the meaning of the subscription.

ACTION on a subscription for stock. The plaintiff was incorporated, for the purpose of constructing and carrying on a hotel in the city of Buffalo. The business was to be managed by a board of directors, who were clothed with the powers usual in such cases.

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and among others that of "calling in subscriptions" to the stock of the company. The defendant subscribed for fifty shares of the capital stock of the company, at \$100 per share, "provided the sum of \$200,000 be subscribed by the citizens of Buffalo." Afterward the defendant gave notice to the plaintiff that he withdrew his name as a subscriber to the capital stock of the company. Subsequently the board of directors made two calls for portions of the subscriptions, amounting, in the defendant's case, to \$1,500; and these not being paid, this action was commenced on the 9th of February, 1876, for their recovery. Upon the trial the defendant's counsel moved for a nonsuit because "the plaintiff had not proved that the subscribers to the capital stock of the company were citizens of Buffalo or residents of that city." A nonsuit was denied. The defendant asked to go to the jury. This was also denied. The opinion states other facts, plaintiff had judgment, which was reversed by the General Term.

Sherman S. Rogers, for appellant.

George Cleveland, for respondent.

DANFORTH, J. [After stating the facts, and omitting another question.] The objection most earnestly relied upon by the learned counsel for the respondent is, that the sum of \$200,000 was not subscribed for by citizens of Buffalo; and if this is so, the judgment appealed from must stand, notwithstanding the validity or even payment of the subscriptions so made, for the defendant thus qualified his promise. In order to answer the question now raised, we are to ascertain who were intended by the term "citizens of Buffalo." The word has more than one meaning, and must be taken in the sense which best harmonizes with the subject-matter in reference to which it is used. With what object and intention, therefore, was it introduced into the contract? This inquiry accords with an accepted rule of interpretation, that "all words, whether they be in deeds or statutes, or otherwise, if they be general and not express and precise, shall be restrained unto the fitness of the matter or person:" *Bacon's Maxims of the Law, Regula X.* By the definition usually given, a citizen is "an inhabitant of a city, town or place," and so would include every person dwelling in the place named; but it is subject to various limitations depending upon the context in which it is found. It may indicate a permanent resi-

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dent, or one who remains for a time or from time to time. That it has various meanings, according to the object in view, is well illustrated by different statutes in which it appears. An act which imposes the burden of making and repairing bridges on the "inhabitants," in the town or county in which they are situated, is held by that term to include all holders of houses and lands in the locality, whether resident or not, but as excluding actual dwellers who had no ratable property in the place, such as servants (*Rex v. North Curry*, 4 B. & C. 953); and this agrees with the definition given by Jacobs in his Law Dictionary and adopted by ALLEN, senator, in *Matter of Wrigley*, 8 Wend. 141, viz.: "He who hath a house in his hands in a town may be said to be an inhabitant." But where a person occupied premises in one parish and carried on his business in person there, but resided in his dwelling-house in another, he was held not to be an inhabitant of the former parish, so as to be bound to serve as its constable. *Rex v. Allard*, 4 B. & C. 772; *Rex v. Nicholson*, 12 East, 330. A man may be domiciled in one place and be a resident in another, at the same time, as in the case of *Wrigley, supra*. His domicile was England, but he was said to be an "inhabitant" of New York while he transacted business there; and so in questions affecting the rights of creditors, 19 Wend. 47; and those concerning taxation. By the Revised Statutes, tit. 2, p. 1, chap. 13, art. 1, vol. 1, p. 389, § 5, it is assumed that a person may reside in more than one place during the same period; and his residence, within the meaning of that section, is declared to be the county, town or ward in which his principal business shall have been transacted. This question is considered in *Bell v. Pierce*, 51 N. Y. 12; and it is there shown that a man may be a resident of two places at one and the same time, and that "to establish a residence requires a less permanent abode than to give a domicile, or even to create an inhabitance." In the case before us, the object of the subscription was to provide for the erection of a hotel; and this is well put by counsel in behalf of the respondent. It was, he says, "a project in which the business men of the city were peculiarly interested," and the object of the respondent himself is stated by his learned counsel. He "desired," it is said, "that the hotel, which he expected and hoped the corporation formed for that purpose would build, and from the erection of which he calculated great pecuniary benefits in his business, should be under the control and management of his fellow townsmen — men whose interests

were in the same direction as his." This statement is warranted by the defendant's evidence as a witness. Now to promote this object it was not necessary or expected that the subscriptions should be by persons who were qualified voters in Buffalo. They would constitute one class of citizens, and for certain obvious purposes the only ones entitled to that name; and it is not unlikely that much local patronage of the hotel when erected would be drawn from that class. But the object was to erect the hotel, and for that purpose, not only to procure the necessary funds, but at the same time to enlist the interest of the business men of Buffalo in the enterprise, so that as far as possible, they would be concerned in securing for it patronage, and contribute to its success. For that purpose, it would be immaterial whether the subscriber occupied with his family a house within the limits of the city, or outside of them, so long as his place of business was in Buffalo, and he had a permanent pecuniary interest in its welfare and in the success of the new house. In that view we must consider the objections pointed out by the exception taken to the subscriptions of Richmond and Spencer. Mr. Richmond resided, at the time of the trial, in Buffalo, but at the time of the subscription, had his house and legal residence in Batavia, Genesee county, and says: "I boarded in Buffalo, at the Tift House. I spent nearly all my time in Buffalo. I was engaged in business there." His domicile, then, was Batavia; but that is in no respect inconsistent with the fact that his residence was in Buffalo. He was actually there the greater part of the time, and was permanently there for business purposes. He is within the definition adopted in *In re Thompson*, 1 Wend. 45, viz.: "He who stops even for a long time in a place for the management of his affairs, has only a simple habitation there, but has no domicile."

[Omitting other points.]

We are thus led to the conclusion that the case was well disposed of by the learned trial judge. Therefore the order of the General Term should be reversed, and judgment absolute rendered for the plaintiff upon the verdict, with costs.

Order reversed, and judgment accordingly.

All concur.

NOONAN V. CITY OF ALBANY.

(79 N. Y. 470.)

Municipal corporation — negligence — surface water.

A municipal corporation has no right to confine a small, natural stream within a box drain, allow the same to become obstructed, and so turn surface water into it that the stream is swelled beyond its natural capacity, and overflows and injures the land of an adjoining proprietor. (*See note, p. 542.*)

ACTION of damages for overflow by surface water. The opinion states the facts. The plaintiff had judgment below.

R. W. Peckham, for appellant. Defendant had a right to drain the lands and streets into a natural water-course, and is not liable to plaintiff for damage caused by any increase in the amount of water thrown into said stream by such drainage. *Wagner v. R. R. Co.*, 2 Hun, 633, 636; *Waffle v. N. Y. C. R. R. Co.*, 58 Barb. 413; affirmed 53 N. Y. 11-13; *Foot v. Bronson*, 4 Lans. 47; *Waffle v. Porter*, 61 Barb. 130-134; *Angel on Water-courses* (6th ed.), §§ 108-108a.

E. Countryman, for respondent.

ANDREWS, J. The defendant by means of the Lark street and connecting sewers, and the manner of grading Colonie street, concentrated the surface water and sewage of a large territory, and discharged it in one body, at the junction of Lark and Colonie streets, into a ravine. It passed after its discharge over ground used as a dumping place for refuse, and down the declivity until it reached the valley or bed of the ravine, and flowing easterly reached the premises of the plaintiff, and having no sufficient outlet flooded the plaintiff's lot, and deposited thereon the filth carried by the sewers, and the sand and dirt washed down by the water as it passed over the dumping ground. This *prima facie* established a right of action in the plaintiff. A municipal corporation has no greater right than an individual to collect the surface water from its lands or streets into an artificial channel, and discharge it upon the lands of another, nor has it any immunity from legal responsi-

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bility for creating or maintaining nuisances. *Weed v. Village of Brockport*, 16 N. Y. 172, note; *Byrnes v. City of Cohoes*, 67 id. 204; *Haskell v. City of New Bedford*, 108 Mass. 208; *Attorney-General v. Leeds Corporation*, L. R., 5 Ch. App. 583.

The defendant sought to defend the injury to the plaintiff on two grounds: first, that it had the legal right to drain into a stream which flowed through the bed of the ravine across the plaintiff's land without responsibility for consequential injuries resulting to the plaintiff from such drainage, and that the water and sewage which flooded the plaintiff's premises were discharged into this stream; and second, that the injury was attributable to an obstruction of the channel of the stream below the plaintiff's lot, which prevented the water and sewage from passing therein, as it otherwise would have done. In support of the first proposition the defendant's counsel relies upon the decision of this court in *Waffle v. New York Central Railroad Company*, 53 N. Y. 11; s. c., 13 Am. Rep. 467, in which it was held that the owner of lands upon a natural water-course may collect, by means of ditches, the surplus water on his premises, and discharge it into the stream, although by so doing the flow of water therein at some seasons may be increased, and at other times, at periods of low water, by reason of the more rapid drainage, may be diminished, to the detriment of a mill-owner below. The right of a riparian owner to drain the surface water on his lands into a stream which flows through them, and which is its natural outlet, is an incident to his right as riparian owner to the reasonable use of the stream. But this right is not, we conceive, an absolute right under all circumstances, irrespective of the size of the stream, or the natural purpose which it subserves, to throw into it surface water, by means of ditches or drains, when by so doing it will be filled beyond its natural capacity, and overflow and flood the lands of a lower proprietor. The stream into which the sewage and water collected by the defendant found its way was a mere rivulet of water, the outlet of springs at the head of the ravine. It may also, before the sewers were built or Colonie street was graded, have received a portion of the surface water from the territory drained thereby. But at that time the surface water had no defined channel. It was subject to be disposed of by the ordinary processes of nature. Absorption and evaporation would diminish the amount which otherwise might have found its way to the valley, and the discharge into the stream of the portion not

otherwise disposed of would naturally be gradual, and reach it at different points in its course. It does not appear that the city owned any of the land between the sewer and the water-course, but it had with the consent of the property owners changed the water-course from its natural condition, and constructed a box drain two or three feet square in its place. In view of the character and capacity of this water-course, it cannot we think be held as matter of law that there was the right in the city to discharge into the stream the water from Colonie street, and from the Lark street sewer, although by so doing it would flood the premises of the plaintiff. It follows that the first request to charge was properly refused. The request assumes that the city, using reasonable care, had the absolute right to drain into the water-course in question, irrespective of the capacity of the stream or the amount of water discharged into it, and the court was requested to instruct the jury that it was not liable "for any damage caused by *any increase* in the amount of water thrown into the stream by such drainage."

The second ground upon which the reversal of the judgment is sought is also, we think, untenable. The obstruction to the creek-drain, so called, was not so far as the evidence shows attributable to any act of the plaintiff, or any act for which he was responsible. The filth and material carried into it by the sewers may and doubtless did contribute to choke and fill it. The plaintiff had no control over the drain below his premises. He was not bound to protect himself against the consequence of the illegal act of the defendant, by removing or causing the removal of the obstruction. The casting on the plaintiff's premises of the filth from the sewers was a nuisance, and the defendant was bound to abate it. Because the injury complained of would not have happened, or would have been diminished if the creek-drain had been unobstructed, does not relieve the defendant from legal responsibility.

We think the case was fairly presented to the jury, and that the judgment should be affirmed.

All concur.

Judgment affirmed.

NOTE BY THE REPORTER.—This appears to be a clear case of negligent interference with a natural stream, and what is above stated in regard to a private riparian proprietor may be *obiter*, although it is probably the law. See *O'Brien v. City of St. Paul*, 18 Minn. 174. In *Mayor and City Council of Cumberland v. Willison*, 30 Md. 133; s. c., 23 Am. Rep. 384, the defendants, in the execution of powers conferred on them by their charter, for the paving, grading, repairing, draining, sewerage, and re-extending of the streets of the city

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but with no want of reasonable care and skill in making the improvements, changed or so directed the natural flow of surface-water, which usually found its way into a mill-race in the city, that a larger flow of such water than formerly was emptied into such mill-race, along a given street, and in times of heavy rains a larger quantity of mud, sand, and debris was thus carried into the race near the mill than before such improvements were made. For the injuries caused by these obstructions to the free flow of the water the owner of the mill brought suit. *Held*, that there was no ground of recovery. *Crawford v. Village of Delaware*, 7 Ohio St. 459; *Barron v. Mayor, etc., of Baltimore*, 3 Am. Jour. 308, and *Nevas v. City of Peoria*, 41 Ill. 508, disapproved. In *Lynch v. Mayor*, 76 N. Y. Ct. S. C., 38 Am. Rep. 371, the city, in raising the grade of an avenue, neglected to provide for carrying off the surface-water or to prevent its draining on adjacent lands, to the injury of an adjoining owner. *Held*, no cause of action, it not appearing that there was any diversion of any stream on the plaintiff's land, nor the collecting and throwing of surface-water on his land, nor the causing of more water to flow than would have flowed if the grade had not been raised. In the still more recent case of *O'Brien v. St. Paul*, 25 Minn. 388; S. C., 38 Am. Rep. 470, it was held that if a city, in improving its streets, accumulates surface-water, and turns it in new and destructive currents upon the lands of adjoining owners, it is liable in damages. To the latter effect are *Pettigrew v. Village of Evansville*, 25 Wis. 223; S. C., 3 Am. Rep. 50; *City of Aurora v. Reed*, 57 Ill. 20; S. C., 11 Am. Rep. 1; *City of Dixon v. Baker*, 65 Ill. 518; S. C., 16 Am. Rep. 591; *Ross v. City of Clinton*, 46 Iowa, 606; S. C., 36 Am. Rep. 169. In *Taylor v. Fickas*, 64 Ind. 167; S. C., 31 Am. Rep. 114, a land-owner, who planted trees on his land, thus obstructing the passage of drift-wood carried on the land of an adjoining proprietor by the overflow of a water-course adjacent to the lands of both, was held not liable. See *McCormick v. Kansas, etc., R. Co.*, post; *Wakefield v. Newell*, 12 R. I. 75; S. C., 34 Am. Rep. 598.

In *Gulison v. City of Charleston*, 16 W. Va. , it was held, that where a city, in grading its streets by cutting ditches and drains, collects surface-water and casts it in a body upon the lot or ground of the proprietor below, unless it is so cast into a natural water-course, the proprietor sustains a legal injury, and may recover in an action therefor; and that it is the duty of a city, in making improvements upon the streets, to use such skill that the course of the surface-water shall not be changed in such manner as materially to injure the property adjoining.

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(79 N. Y. 490.)

Partnership — dissolution — use of name on signs.

On the dissolution of the firm of M. & S., S. bought M.'s interest in certain of the firm property, and assumed the rent of the old stand, where he continued the business, while M. opened an office for the same business in another part of the city, as it was understood he was to do. M. removed his name from the old firm sign, but S. replaced it, placing over it "S. successor to," in small and almost imperceptible letters. *Held*, that S. should be restrained from such use of M.'s name. (See note, p. 548.)

ACTION to restrain defendant from using the name of plaintiff upon signs, circulars or advertisements, and from declaring himself to be the successor of the late firm of Morgan & Schuyler.

The parties had been partners as dentists under the firm name of "Morgan & Schuyler," in rooms in the city of Rochester. They dissolved by written agreement, defendant purchasing certain partnership property and assuming the rent of the rooms so occupied by the firm, which he was to continue to occupy. The plaintiff opened another office in the same city, as it was understood he was to do. The firm had used signs exhibiting the firm name. After the dissolution plaintiff removed his name from the signs. Defendant replaced the firm name as nearly as possible as before, and over it the following: "B. F. Schuyler, successor to," in small and almost imperceptible letters. A judgment was directed for plaintiff, requiring defendant to remove the name of plaintiff from his signs and advertisements.

J. C. Cochran, for appellant. By the agreement of dissolution the good-will of the firm passed to defendant. High on Injunctions, § 686; *Dougherty v. Van Nostrand*, 1 Hoff. Ch. 70; *Muselman's Appeal*, 62 Penn. St. 81. The firm name was a part of the good-will, and defendant could bring an action to restrain plaintiff from using it. *Dayton v. Wilkes*, 17 How. Pr. 510; Story on Part., § 99; *Churton v. Douglas*, 1 H. R. V. Johns. 174; *Williams v. Wilson*, 4 Sandf. Ch. 379; High on Injunctions, § 686; *Hall v. Hall*, 20 Beav. 139; *Banks v. Gibson*, 34 id. 568.

John S. Morgan, for respondent.

DANFORTH, J. There was nothing in the former relations of the parties, or the express terms of the agreement of dissolution, which gave to either one the good-will of the business theretofore conducted by them under the firm name of "Morgan & Schuyler," nor was either in any way restrained from continuing the practice of his profession on his own account in any place. Yet the defendant became the equitable assignee of the unexpired term of the lease under which the firm held its place of business, and the sole owner of certain partnership property and fixtures. He thereby acquired an advantage over the plaintiff, for he had the exclusive right to occupy the rooms of the late firm, and as incident thereto the benefit of that good-will which Lord ELDON defines in *Cruikwell v. Lye*, 17 Ves. 335, "as the probability that the old customers will resort to the old place." The extent of this depends partly upon

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the force of habit, and in the case of such business as had been carried on by these parties in some degree upon the satisfaction which the patient had received at the hands of one or the other member of the firm, but it is after all a very different thing from the good-will which may be said to attach to the person of a professional man as the result of confidence in his skill and ability. The first is of no value except to the occupant of the place (*Clussum v. Dewes*, 5 Russ. 30), while the latter is inseparable from the person, and follows its possessor wherever he goes. So far as it belonged to the plaintiff it could not have been transferred to the defendant, but the advantage secured to him as the occupant of the old place of business would doubtless have been rendered more valuable if the plaintiff had retired not only from the firm but from the practice of his art. This however he not only did not undertake to do, but it was understood by both parties at the time of dissolution that the plaintiff was at once to open an office and carry on his business of dentistry in the same city. This fact precludes the idea that the defendant acquired any good-will in the business except such as was incident to his sole ownership of the property mentioned in the agreement. It is evident therefore that it was not the intention of the parties that the defendant should in the conduct of his business in any manner use the plaintiff's name, either in combination with his own as "Morgan & Schuyler," or in subservience to it by declaring himself "the successor" to that firm. It is not claimed that there is any express contract to that effect, and none can be implied, either from the language of the agreement actually made or from any fact or circumstance connected with it.

The case was argued by the learned counsel for the appellant with much ingenuity, but I do not think that the cases cited by him sustain the appeal. On the contrary, in *Dougherty v. Van Nostrand*, 1 Hoff. Ch. 70; *Musselman & Clarkson's Appeal*, 62 Penn. St. 81; *Williams v. Wilson*, 4 Sandf. Ch. 379, the good-will in question was that only which pertained to the place of business, and no case holds that the good-will included the right to a continued use of the name of the firm. Indeed in such a case the retiring partner would have given up the advantages, but remained liable to the risks and burdens of business, for if his name continued upon the signs or other advertisements of the firm he would be bound to every one who gave credit thereto, in ignorance of the

real state of the case, and liable for all debts contracted in the firm name. The injury in such a case is obvious. Nor has the defendant any better right to declare himself the "successor of" the firm of "Morgan & Schuyler." In so doing he represents not only that the firm is extinguished, but that his co-member has quit or retired from business. The latter therefore will lose the patronage to which he is entitled, for those persons who might otherwise resort to him for assistance will be misled into supposing that his services cannot be obtained. In either aspect the plaintiff's case was made out. It does not follow, however, that the defendant may not avail himself of the full value of his purchase, and to that end by signs and advertisements refresh the memory of those customers who had acquired a preference for the particular locality in which he continues business, or recall to their attention the circumstance to which that preference might be due. He may lawfully describe the rooms as "formerly occupied by Morgan & Schuyler," and himself as "formerly" or "late" of that firm, by these or other phrases. He would thus state simply facts belonging to his own life or incident to the office, as much so as the time or place of his birth, the name of his father or instructor, the college from which he graduated, or the time when the premises were first used in the practice of his calling. All this might be done in good faith. What has been done is quite different, and apparently for another purpose, without right, and to the plaintiff's injury.

The conclusion of the court below was, I think, correct, and the judgment appealed from should be affirmed.

Judgment affirmed.

All concur.

NOTE BY THE REPORTER.—The question how far an outgoing partner or servant may rely to the firm in signs and advertisements has been considerably discussed. The rights of the outgoing partner, where the good-will is not transferred, stands on the same footing as that of an outgoing servant.

The first reported case connected with this subject is the Irish case of *Foot v. Lea*, 22 *Ir. Eq.* 484, in which an ex-employee of a firm of Dublin snuff manufacturers, trading as Lundy Foot & Co., styled himself on his packets of snuff, and on the board above the door, "A. Lea, late at Lundy Foot & Co." The question at issue was not decided, the Master of the Rolls being of opinion that the question must be decided by a court of law, involving as he thought it did, a legal right.

In *Burgess v. Burgess*, 3 *DeG. M. & G.* 896, among the circumstances of which the plaintiff complained was this, that the defendant, his son, who had been in his employment, had styled himself on his shop front and labels as "late of 107 Strand," that being the plaintiff's address. In so far the defendant was restrained.

In *Edelsten v. Vick*, 11 *Hare*, 78, the defendants were committing a palpable fraud, by selling pins in packets made up and labelled similarly to the plaintiff's, except that to the

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inscription "Taylor & Co.'s Patent Solid-Headed Pins," they prefixed the words "J. Vick, from the late." An injunction was granted, notwithstanding an attempt to meet the plaintiff's attack by arguing that they were disintituled by the appearance of the word "Patent" in their inscription after their patent had in fact expired.

In *Burrows v. Foster*, 1 N. R. 156, it had been agreed by deed that two partnership firms should be dissolved, and their estates liquidated, and that the plaintiff, who was to be one of the liquidators, should have the benefit and advantage of the business and connections of the former firms, and should be at liberty to carry on the business in a new partnership with another person. The defendant, however, who had been a partner in one of the dissolved firms, sent round circulars to the connections of his old firm, referring to his old position in it and to the dissolution, and asking for orders for a business which he was intending to carry on in continuance of the old one. An injunction was granted to restrain the defendant from issuing such circulars representing that he was trading in continuance of the old business, and from soliciting the customers of his old firm.

In *Clark v. Leach*, 1 DeG., J. & S. 406, the question was, whether, after the expiration of the term of seven years for which the partnership was formed, a clause in the partnership articles providing that in certain events a partner receiving from the other notice of the termination of the partnership, should be considered as quitting the business for the benefit of the partner giving the notice, continued in force. The partner to whom such notice was given, after the term had expired, set up in business in the neighborhood as "R. Leach & Co., late Leach & Clark," and the court held that he was justified in so doing, and that the articles did not apply in this respect, the circumstances having altered. The court said: "Has not the defendant a right to say that he lately belonged to a certain firm, and cannot he advertise that fact? The difficulty is, if he cannot be prevented from carrying on the same business, is he not at liberty to solicit the public at large, and to do so by telling, as is the truth, that he belonged to a late firm?"

In *Harper v. Pearson*, 3 L. T. (N. S.) 547, the defendants had leased certain firebrick works in succession to the plaintiffs, Messrs. Harper & Moore, but not the mines from which the clay was obtained, and described themselves on cards and circulars as "E. & J. Pearson (late Harpers & Moore)." In *Scott v. Scott*, 16 Id. 143, the defendants were the occupiers of certain business premises previously occupied by Messrs. Robert & Walter Scott, having been placed in possession by one of the partners, R. Scott, who had purchased his copartner's interest therein. The defendants styled themselves on a door-plate as "Scott & Nixon, late Robert & Walter Scott," although R. Scott had agreed with his former partner that neither should use the old name except for winding up the affairs of the partnership. In each of these cases the effect of the defendants' conduct was to imply, not only that they had succeeded to the good-will of the business, but that their predecessors had retired from the trade, and neither case turned upon the defendants having been members or employees of the former firm of whose reputation they had availed themselves. Injunctions were granted in both these cases.

In *Leather Cloth Company v. American Leather Cloth Company*, 1 H. & M. 271, it was held that persons who had been in the employ of Crockett, the original manufacturer of Crockett's leather cloth, were justified in styling themselves "late with Crockett," in such a manner as not to deceive.

In the important case of *Glenny v. Smith*, 2 Drew. & Sm. 476, one of the employees of Thresher, Glenny & Co., of the Strand, having left their service and opened a shop in Oxford street, placed his own name over the door, but put on the awning and on the door-plates, the words, "From Thresher & Glenny." The word "from" was in very small letters, so as not to be likely to attract the attention of customers, and on the whole case the learned judge came to the conclusion that deception was probable, and that an injunction must be granted. The fact that the defendant had cautioned one of his shopmen not to permit customers to buy under the impression that they were buying from Thresher & Glenny, so far from being regarded as favorable to the defendant, was held to be against him, as showing that he had contemplated the possibility of deception by the use he was making of his old employers' name. The court said: "There is no question but that if a man, having been in the employment of a firm of reputation, sets up in business for himself, he has a right in any way in which he thinks fit, provided it is done in accordance with the rule I have stated (i. e., so as not to deceive), to inform the public that he has

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been in such employment, and in that way to appropriate to himself some of the benefit arising from the reputation of his former employers. But in so doing he must take special care that it is done in such a way as not to mislead the public to the detriment of his former employers." But it was also laid down, "that it does not signify, for the purpose of the plaintiff's right to relief, whether the defendant has acted with a fraudulent intention or not; it is enough if, even without any unfair intention, he has done that which is calculated to mislead the public. * * * And it is not the question whether the public generally, or even a majority of the public, is likely to be misled, but whether the unwary, the heedless, the incautious portion of the public would be likely to be misled." An injunction was granted.

In *Williams v. Osborne*, 13 L. T. (N. S.) 498, it was held that former servants of R. Hendrie, a perfumer, were entitled to place in their shop, established after his death, the words "from the late R. Hendrie," and to style themselves on placards "managers and manufacturers to the late R. Hendrie," and to use Hendrie's name on their labels in conjunction with their own, if there were no unfair or untrue statements made; but the court pointed out that a certain course of conduct which was begun with no fraudulent intention would be continued with such intention if no change were made after it had been shown that the public were deceived.

In *Labouchere v. Dawson*, L. R., 13 Eq. 322, the defendant was one of the vendors of a brewery business, who, after the sale, set up in business elsewhere, and endeavored to draw away to his new business the old customers of the business he had sold. Lord Russell held, that while the defendant was entitled publicly to advertise his business, he was not justified in seeking to destroy the value of the business he had sold by drawing away the customers to his new one.

In *Hookham v. Pottage*, 21 W. R. 47, after the firm of "Hookham & R. & S. Pottage" had been dissolved, and the last two partners paid out, so that the business was retained by the senior partner, who began to trade as "Hookham & Co.," S. Pottage set up near him, and placed over his shop the words "S. Pottage, from Hookham & Pottage," and the words denoting the relation between the old business and the new one — i. e., "from" and "and" — were in small letters. It was held that the defendant had acted so as to divert to himself custom intended for the plaintiff, and that an injunction must be granted, though, if he had confined himself to a fair statement of his connection with the old firm, he could not have been interfered with.

The plaintiff in *Robineau v. Charbonnel*, V. C. M., May 4, 1876, was a Parisian confectioner, trading at the "Maison Boissier," and the defendants were persons who, after having been in his service, came over to London and opened a shop in Bond street, and placed in the window the words "Ex lères de la Maison Boissier de Paris." The plaintiff having no shop in England, no injury could be done him by the defendant's conduct, and no injunction could be granted, but the words "Ex lères de la" were in very small letters, and the vice-chancellor was of opinion, that on the whole, the conduct of the defendants had not been such as to entitle them to their costs, and no order in that respect was made.

In *Dence v. Mason*, V. C. M., February 12, 1878, the vice-chancellor held, that a former servant of Messrs. Brand & Co. would not have been entitled to represent himself as the original maker of the essence of beef manufactured by that firm, even if he had been the first to discover the recipe, since whatever essence of beef he had prepared had been made by him in the plaintiff's service; but his lordship held that the defendant was at liberty to state fairly that he had been in the plaintiff's service, and that he had become acquainted with the recipe during that period.

In *Selby v. Anchor Tube Company*, V. C. B., July 19, 1877, the parties had been in partnership as tube manufacturers, carrying on business at Birmingham as the "Imperial Iron Tube Company," and at Smethwick as "The Birmingham Patent Iron and Brass Tube Company." The partnership was dissolved, and the plaintiff thereupon became entitled, under the partnership deed, to the premises at Smethwick and to the styles and good-will of the firm, and the defendant became entitled to the Birmingham premises. The plaintiff then carried on business alone at Smethwick and also at new works at Birmingham as "The Imperial Iron Tube Company," and the defendants, carrying on business at the old premises in Birmingham, began to put out circulars headed "The Anchor Tube Company (late) the Works of and Partners and Manager in the Imperial Iron Tube

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Company, Gas street, Birmingham," and to solicit the customers of the old firm. This was held to be an interference with the plaintiff's rights, and an injunction was granted.

In *Fullwood v. Fullwood*, 36 W. R. 435, the plaintiff was carrying on at Somerset place, Hoxton, an annatto business, established, under the name of "R. J. Fullwood & Co.," in 1785, and the defendants, one of whom had formerly been the plaintiff's partner, but had sold his interest to the plaintiff, began to carry on a similar business under the name of "E. Fullwood & Co.," and to describe themselves in advertisements as "late of Somerset place, Hoxton, Original Manufacturers of Liquid and Cake Annatto," and to state that their business had been "established in 1785." Mr. Justice FRY held that the course taken by the defendants would probably have the result of causing their business to be mistaken for the plaintiff's, and he granted an injunction, notwithstanding that the plaintiff had delayed commencing his action for a year and a half after he became aware of the defendants' conduct.

In *Churton v. Douglas*, H. R. V. Johnson, 174, the partnership of John Douglas & Co. was dissolved, and John Douglas sold his interest and the good-will to his late partners and another, who thereupon carried on the business under the style of "C. B. & H., late John Douglas & Co." Douglas thereupon reopened the same kind of business in connection with L. P. & S., under the firm name of "John Douglas & Co.," on premises next door to the old stand. It was held that the defendant should be restrained from the use of the name of "John Douglas & Co." in that business at or in the immediate neighborhood of the town where the old business had been carried on. The court said that upon the mere sale of the good-will the vendor was not precluded from setting up the same kind of business, even next door to the old stand, but that the right to such exclusive use of the old firm name in the neighborhood goes with the good-will. The court remarked that "it is not as if he were calling himself 'John Douglas' alone." See, also, *Crutwell v. Lye*, 17 Ves. 534; *White v. Jones*, 1 Robt. 321.

In *Brinks v. Gibson*, 34 Beav. 566, it was held that upon the dissolution of a partnership and division of the assets, in the absence of any agreement as to the use of the firm name, either of the late partners was at liberty to use it.

In *Scott v. Rouland*, 26 L. T. (N. S.) 391, on dissolution, purchase of stock by one partner, but no sale of good-will, the other partner was restrained from continuing to use the firm name.

In *Lewis v. Langdon*, 7 Sim. 421, A. and B. had carried on business under the firm of A. & L. A. died, and B. carried on the business under the firm of "B. & Co. successors to A. & L." A.'s executor, having commenced the same business under the firm of A. & L., he was restrained. See, also, *Bowman v. Floyd*, 3 Allen, 76.

In *Scott v. Scott*, 16 L. T. (N. S.) 143, R. Scott and W. Scott had carried on business at N. and G. as partners by the name of R. & W. Scott. The firm was dissolved, it being agreed that one of the partners should remain at N., but there was no sale of the good-will nor any covenant not to set up the same business again, but neither partner was to use the firm name except in winding up the old business. W. Scott shortly afterward retired and set up the same business at T. near N. R. Scott made over his business at N. and G. to the defendants, who at G. used the sign "Scott & Nixon, late R. & W. Scott, of N." On application of W. Scott this was enjoined. This case is analogous to *Howe v. Searing*, *infra*.

In *Hookham v. Pottage*, L. R., 5 Ch. App. 91; a firm of H. & P. was dissolved, it being agreed that the business should belong to H., who accordingly kept up the shop under the name of H. & Co. P. set up a shop in the same business a few doors distant, putting up a sign, "P. from H. & P." The words "from" and "and" were in small capitals, the others in large. This was enjoined.

In *Colton v. Thomas*, 2 Brewst. 306, the defendant, who had been employed at the plaintiff's dental rooms as a dentist, in Philadelphia, set up business in the same city and street, in his own name, putting on his cards and signs the words, "late" or "formerly" "operator at the Colton Dental Rooms," the words "late operator at the" and "formerly operator at the" being in small, and the words "Colton Dental Rooms" in large letters, and the signs being very similar to those at the rooms in question. This use of the words in question was restrained.

In *Partridge v. Menck*, 2 Sandf. Ch. 692, the complainant had bought the right to manufacture A. Golsh's friction matches. J. Backes, who had been a chemist in Golsh's em-

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ploy, set up the same business, using labels, etc., with an imitation of Golsh's trademark of a beehive with flowers and foliage, and an inscription, "Menck & Backes, friction matches made by J. Backes, late chemist to A. Golsh." The words "late chemist to" were the smallest, and the words "A. Golsh" was much the largest of all. *Held*, that this would not be restrained. This case was affirmed, How. App. Cas. 547, on the ground that bill was wanting in equity, the complainant himself deceiving the public (by GARDNER, J.), and that there was no deceptive similarity between the labels (by WRIGHT, J.).

In *Peterson v. Humphrey*, 4 Abb. Pr. 394, Peterson & Humphrey failed, and each set up business for himself, Humphrey continuing at the old stand, and using the old signs of "Peterson & Humphrey." On one he distinctly prefixed the words "Humphrey & Co. formerly." This was upheld; but he was restrained from keeping up the old signs without any such prefix, or without obliterating the name of Peterson.

In *Reeves v. Denicke*, 12 Abb. Pr. (N. S.) 92, it was held that on dissolution, one partner could not set up the same business, announcing himself as "successor to" the old firm, where the other had also continued the same business in his own name. *Peterson v. Humphrey*, *supra*, was disapproved, but the cases are quite distinguishable.

In *Lathrop v. Lathrop*, 47 How. Pr. 532, the firm of J. Lathrop & Co. was dissolved, with no agreement as to the good-will or the use of the firm will, nor any restriction on entering into the same business. The plaintiff set up business for himself in his own name, and the defendant formed a partnership with P. under the firm name of J. Lathrop & Co. *Held*, that such use of the old firm name could not be restrained, as it properly described the new firm.

In *Bininger v. Clark*, 60 Barb. 113, the defendant, Abraham Bininger Clark, had been a partner in the firm of A. Bininger & Co. That firm was dissolved, and went into bankruptcy, and he and his son commenced a similar business on their own account in the next store, putting on the firm's late place of business a sign stating that "A. Bininger Clark & Son" had "removed to No. 98, next door below." They also advertised and put up signs that they were "successors to A. Bininger & Co." Defendant had always been known as "Abm. B. Clark," and had always so signed his name. This conduct was enjoined at the suit of Abraham Bininger.

In *Smith v. Cooper*, 5 Abb. N. C. 374, C. retired from the firm of S. G. C. & Co. (the other partners continuing at the old place), and set up the same business, on the same side of the same street, about fifty feet distant from the old stand, adding to his name on his sign, the words "of the late firm of S. G. C. & Co.," the words "of the late firm of" being about one-third as large as the words "S. G. C. & Co." This was enjoined by the Brooklyn city court.

But on a sale by an individual of a business and the good-will, with a covenant not to carry on the same business, the right to use the vendor's name in the business does not pass. This was the case of "Howe's Bakery." *Howe v. Searing*, 6 Bosw. 354. See note, 28 Am. Rep. 336.

POWER V. CASSIDY.

(79 N. Y. 602.)

Will — trust for charity — certainty of object.

A testamentary trust of property to be divided by the executors "among such Roman Catholic charities, institutions, schools, or churches in the city of New York" as the majority should select, and in such proportions as they should think proper, is valid, there being corporations answering the description and empowered to take. (*See note p. 555.*)

ACTION for construction of a will. The opinion sufficiently states the case.

J. W. Gerard and *B. F. Dunning*, for appellants. No trust is raised at all unless there is a definite beneficiary, capable of coming in court and claiming the benefit bestowed. 2 Story Eq. Jur., §§ 964, 979; ; *Wheeler v. Smith*, 9 How. 55, 79; *Maurice v. Bishop of Durham*, 10 Ves. 521; *Holmes v. Mead*, 52 N. Y. 332; *Dillaye v. Greenough*, 45 id. 438; *Wright v. Atkins*, 1 Turn. & Russ. 157; *Levy v. Levy*, 33 N. Y. 97; *Ellis v. Selly*, 1 Myl. & Craig, 286; *Maurice v. Bishop of Durham*, 10 Ves. 522; *Norris v. Thomson's Exr.*, 4 C. E. Green, 307; *Stubbs v. Sargon*, 2 Keen, 255; s. c., 3 Mylne & Craig, 507; *Ommany v. Butcher*, 1 Turn. & Russ. 260; *Nash v. Morley*, 5 Beav. 182; *Sherwood v. Am. Bible Society*, 1 Keyes, 561; *McCaughal v. Ryan*, 27 Barb. 376; *Downing v. Marshall*, 23 N. Y. 366.

John E. Develin, for respondents.

MILLER, J. The testator by the first clause in his will gave and bequeathed all his property, both real and personal, to his executrix and executors, "to have and to hold the same * * * upon the trusts, nevertheless, that they are to collect the money due on the bonds and mortgages due to me, and also the rents of my property, and sell and dispose of my stocks; and out of the proceeds of the sale of my property or the income thereof," he directed that the sum of \$8,000 a year be paid to his wife in half yearly installments "during her natural life, and to be in lieu of all dower or thirds" in his estate. After making other bequests and conferring power upon his executrix and executors to sell his real and personal estate, he devised one-third of the rest, residue and remainder of his estate to his wife, one-third to his nephew, Peter Rise, and provided as follows, "And the balance I give to my executors, to be divided by them among such Roman Catholic charities, institutions, schools or churches in the city of New York as a majority of my executrix and executors shall decide, and in such proportion as they may think proper."

The first question which arises relates to the validity of the clause last above cited. It is insisted by the counsel of the plaintiff, who is an executrix named in the will and the widow of the testa-

tor, that no definite beneficiary capable of taking is designated, and that there is no absolute certainty as to the nature and terms of the bequest; and the well-settled doctrine is invoked, that where the conditions of the trust created are so vague and indefinite that a court of equity cannot clearly ascertain either the objects or the persons who are to take, the trust will be held to fail, and the property will fall into the general fund of the author of the trust. Story Eq. Jur., §§ 964, 979.

If we give full force and effect to the rule stated and hold that the language employed must be such as to show that the object is certain and well defined; that the beneficiaries are either named or capable of being ascertained within the rules of law which are applicable to such cases; and that the trusts are of such a nature that a court of equity can direct their execution, we are of the opinion that the gift in question was valid and should be upheld.

The clause cited designates a certain class of institutions as objects of the testator's bounty, to which from religious association he was evidently attached, and in whose prosperity we may assume he felt an interest. The terms of the will embraced charities, schools, churches and institutions, to which the testator could lawfully have made a direct and valid devise or bequest, and had he selected any of them by name to take a specific portion of his estate, no question would arise as to their right to accept the disposition thus made. That he conferred power and devolved upon a majority of his representatives the duty of designating the organizations which should be entitled to participate in a portion of his estate, and the proportion which each should have in the same, does not, we think, impair or affect the legality of the provision cited, so long as the organizations referred to had an existence recognized by law, were capable of taking, and could be ascertained. The evidence established—and it is beyond any question—that at the time of the execution of the will, and at the time of the testator's death, there were numerous incorporated Roman Catholic benevolent institutions, charities, churches, and schools in the city of New York, which, under the provisions of their several charters, were authorized to take, by devise or bequest, both real and personal estate, and that a portion of these were designated by a majority of the executrix and executors named in the will. The right to make such designation is fully sustained by the decisions of this court. In *Holmes v. Mead*, 52 N. Y. 332, it was held that a beneficiary

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need not necessarily be described by name; that it is not material that a legatee should be definitely ascertained and known at the date of the will, or even at the death of the testator; and it is sufficient, if he is so described, that he can be ascertained and known when the right to receive the gift accrues. In *Le Fevre v. Le Fevre*, 59 N. Y. 434, a misnomer or misdescription of a legatee or devisee, whether a natural person or a corporation, was held not to invalidate the provision, if either from the will itself or evidence *aliunde*, the object of the testator's bounty can be ascertained; and to identify a particular corporation, as the one intended, where a wrong name is used, the identity may be proved by parol evidence. Numerous authorities sustain bequests and devises to executors or trustees, which confer upon them authority to divide the same among such persons as they may select from certain classes which are designated, and among such children or relatives, who are intended to be provided for, whom they may deem proper. *Liley v. Hey*, 1 Hare, 580; *Shotwell v. Mott*, 2 Sandf. Ch. 46; *Bull v. Bull*, 8 Conn. 48; *McLoughlin v. McLoughlin*, 30 Barb. 458; *Trustees v. Colgrove*, 4 Hun, 362; *Norris v. Thomson's Ex'rs*, 19 N. J. 307.

In the case last cited, which is relied upon by the counsel for each of the parties, the power of appointment authorized a devise by the testator's wife among such "benevolent, religious or charitable institutions as she may think proper;" and it was held to be invalid because it was so vague and uncertain that it could not be enforced. It will be observed that no class of institutions were designated, and the chancellor decides that as the power was to give to any of the three, and as "benevolent" institutions were more indefinite and of a wider range than "charitable or religious" institutions, and would include all gifts prompted by good will or kind feeling toward the recipient, whether the object of charity or not, the devise was void. The case supports the position that a designation of a class of benevolent institutions would have rendered it valid, and maintains the doctrine contended for by the counsel for the organizations who have been designated by the executors. The cases cited by the appellant's counsel are not in conflict with those already referred to. In *Stubbs v. Sargon*, 3 Myl. & Cr. 507; 2 Keen, 255, the testatrix during her life had delivered a note of £2,000 to a third person, upon which was indorsed an instrument which declared that the note was given for the sole use and benefit of the holder, independent of her husband,

for the express purpose of enabling her to present to either branch of the family of the donor any principal or interest the donee might consider most prudent, with power to dispose of the same by will or deed "to either branch of the family she may consider most deserving thereof;" and it was held that it was a gift upon trust, and that the trust failing the sum secured by the note constituted part of the testatrix's estate. While it may well be that the trust was too indefinite to be executed and hence was void, the case is not analogous to a testamentary disposition for the benefit of organizations which have a legal existence and which can be easily ascertained. But even if the case last cited was favorable to the position claimed it would, we think, be against the general current of authority which upholds trusts of this character. In *Morice v. Bishop of Durham*, 10 Ves. 522, the devise was for such objects of benevolence and liberality as the trustee in his discretion shall approve, and it was held that it could not be supported as a charitable legacy. The decision was put upon the ground that the word "liberality" meant something different from charity, and hence the bequest was not within the statute of charitable uses. In *Ommanny v. Butcher*, 1 Turn. & Russ. 260, the devise was very indefinite, and the principal question considered related to the residuary clause in the will. The case last cited was recently considered in *Kerr v. Dougherty*, and has, I think, no direct bearing upon the question now presented. The other cases cited do not require especial consideration.

The bequests made could only be carried into effect by the selection of organized bodies, and hence no danger is to be apprehended from an improper selection. Nor is there, in my opinion, any difficulty in determining to what class the words "Roman Catholic" apply. It is a well known designation of a denomination of Christians, who have adopted this name, and have distinct tenets, and have been frequently recognized in various legislative enactments in reference to this organization. It has churches, institutions of learning, charitable and other bodies, which might be easily selected as objects of consideration, as provided by the will. The executors were to decide which of all the institutions known as Roman Catholic were entitled to the benefits to be conferred, and no embarrassment appears to have been experienced in making a selection; nor is it apparent why such a disposition of a portion of an estate could not be carried into effect. The rule is well settled that when a gift

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is capable of being executed by a judicial decree, there is no reason why a court should not execute it. *Williams v. Williams*, 4 Seld. 524; *Owens v. Mis. Soc.*, 14 N. Y., 408. Had there been a failure to make the selection as provided, for any reason, within the authorities cited, the court would have power to decree the execution of the trust. The first clause in the will gives all the property of the testator to his executrix and executors in trust for certain purposes specified. So much of the estate only as was necessary to carry these purposes into effect passed under this provision, and the remainder was to be divided as directed. The intention of the testator was plainly manifest as to such remainder, and he had a perfect right to make such a disposition of his estate, after it was converted into personalty. The law does not limit or confine trusts as to personal property, except in reference to the suspension of ownership, and they may be created for any purpose not forbidden by law. *Bucklin v. Bucklin*, 1 Keyes, 141; *Gott v. Cook*, 7 Pai. 534. As for the reasons stated the provision in the last clause can be carried into effect, we do not deem it necessary to consider whether it may be regarded as a power in trust under the provisions of the Revised Statutes. 1 R. S. 732, § 74; 734, §§ 95-100.

[Omitting other questions.]

Judgment affirmed.

All concur.

NOTE BY THE REPORTER. — In *Russell v. Allen*, 5 Dill. 235, a conveyance of real and personal property, in trust, "for the purpose of founding an institution for the education of youth in St. Louis county, Missouri," was sustained. TRAUT, J., said: "In this country, after long doubt and disputation, the doctrine has been established that where a grant or devise for charitable uses has been made, and the donee is capable of executing the trust vested in him, the grant or devise should be upheld if the beneficiary or charitable object is stated in such a manner or with such distinctness that chancery can ascertain what it is, so as to enforce the trust." See *Ould v. Washington Hospital for Foundlings*, 1 Mo-Arthur, 605; s. c., 29 Am. Rep. 605; *Adye v. Smith*, 44 Conn. 60; s. c., 26 Am. Rep. 694.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

NICHOLSON V. COX.

(88 N. C. 44.)

Marriage — jurisdiction — married woman's acceptance of service of process.

Jurisdiction of the person of a married woman is acquired by her written admission of service of the summons.

MOTION to set aside a judgment. The opinion states the point.
The motion was denied below.

J. W. Albertson, for plaintiff.

Pruden & Shaw, for defendant.

DILLARD, J. The defendant M. I. Jordan, wife of A. S. Jordan, and her husband, became sureties to the bond of Cox as sheriff, and the execution of the bond by the wife was without the written assent of her husband, and the sheriff having made default in not paying over the county taxes to the plaintiff as treasurer, a suit was instituted and the summons was returned into court with an admission of service indorsed thereon, subscribed by Jordan and his wife in their proper handwritings. The suit went to judgment

by default, and thereupon the defendant M. I. Jordan moved to vacate the judgment as to herself under section 133 of the Code, on the ground of irregularity alleged to consist in the manner of the service of the summons, and upon the ground of surprise and excusable neglect.

His honor ruled against the ground of irregularity and in favor of the defendant, the *feme covert*, on the ground of surprise and excusable neglect, and from that judgment both sides appeal, the defendant assigning error in that his honor held the acceptance of service of the summons by her as legally sufficient to constitute the cause in court as to her.

Upon the defendant's appeal the questions are: Can a married woman admit or accept service in writing of a summons by which an action is commenced, and if she can, then is her acceptance in this particular case legally sufficient to authorize the court to proceed to judgment thereon? It is argued that an infant cannot accept service of a summons, but that the same must be served personally in all cases where the infant is without a general or testamentary guardian, and upon the same reason the summons must be served on a married woman. An infant cannot accept or admit service, for the reason that when without a general guardian no proceedings can be had without a guardian appointed *ad litem*, and no such guardian can be appointed by a court except in conformity to our statute, which, as construed by this court, is mandatory that such appointment can only be made after personal service. Bat. Rev., ch. 17, § 59; *Allen v. Shields*, 72 N. C. 504; *Moore v. Gidney*, 75 id. 34.

Infancy is a disability and extends to all stages of a suit, including admission of service or acceptance of service as a mode of initiating a suit, as well as all ulterior steps in the course of the same, and this proceeds on the theory to prevent fraud. No such reason exists now to hold the admission or acceptance of service of a summons by a married woman as inoperative. She has now the capacity to have and hold her real and personal property, owned at the marriage, as well as her acquisitions during the coverture, as a separate estate, and is competent to contract so as to affect her property within certain limits, under the Constitution of 1868, art. 10, § 6, and under the marriage act, chapter 69 of Battle's Revisal. And a *feme covert* is answerable out of her own estate for her debts and other causes of action before the marriage as well as

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on the contracts she is authorized to make during the marriage, and in suits to enforce that liability, while it is required that the husband be joined she is expressly made competent by section 15 of the marriage act, *supra*, to represent herself if she will as a *feme sole*, or with her consent to be represented by her husband.

The ability to defend an action being thus conferred, no good reason can be suggested as it seems to us, why her enlarged capacity in this respect should not be held to extend to any and all things usual and admissible to constitute a cause in court, such as appearing without summons, or the admission and acceptance of the service of a summons, as in the case of all other persons *sui juris*.

It is our opinion therefore that the acceptance of service of the summons by a married woman will suffice to give the court jurisdiction of the person, and authorize further proceedings according to the course and practice of the court.

[Omitting minor considerations.]

The judgment of the court below holding the acceptance of service sufficient is affirmed, and this will be certified.

Judgment affirmed.

No error.

GOOCH v. MCGEE.

(28 N. C. 58.)

Corporation — real estate acquired by eminent domain — sale of, on execution.

Where a public corporation, in exercise of a delegated right of eminent domain, acquires real estate necessary for public use, such real estate can be sold on execution against the corporation, only subject to the performance of the duties and obligations of the corporation.

ACTION to recover land. The opinion states the point. The plaintiff had judgment below.

Day & Zollicoffer, Gilliam & Gatling, Mullen & Moore and J. B. Batchelor, for plaintiff.

Thos. N. Hill, for defendant.

SMITH, C. J. The plaintiff purchased at a sale under execution against the Roanoke navigation company, certain land which had

been theretofore condemned for its use, under the provisions of the act of incorporation, including the bed covered by the waters of the canal, at its terminus near Welden, and in this suit seeks to recover possession. The defendant had leased the land from the company for a period which had expired before the day of sale, but still continued in possession, refusing to surrender to the plaintiff.

Under an act of the general assembly entitled "An act for the dissolution of the Roanoke navigation company," passed at the session of 1874-75, ch. 198, proceedings had been instituted in the Superior Court of Halifax and the complaint filed, but no further action taken at the date of sale. Two objections are urged for the appellant:

1. That the proceeding to annul the corporation and dispose of its property directed by the statute supersedes and renders nugatory the interference of a creditor, and that no title passed by the sheriff's deed; and

2. That the canal bed, as severable from its general property and franchise, is not subject to execution.

We propose to consider the last proposition first. In *State v. Rives*, 5 Ired. 297, a sale of so much of the road bed of the Portsmouth and Roanoke railroad company as was within the county of Northampton, under an execution at the instance of a judgment creditor, was held to be legal, and the purchaser to have acquired title to the land. This was because of the assumed want of any other remedy for the creditor, and by force of the statute which authorized a plaintiff to sue out against a corporation debtor, "a *distringas* or *fieri facias*, as he may think proper, and the said writs of *distringas* or *fieri facias* may be levied as well on the current money as on the goods, chattels, lands and tenements of the said corporation." Rev. Stat., ch. 26, § 5. The result of upholding this diversion of the property from the original and intended purposes of its condemnation to the use of the company, and the injustice done the former owner, whose damages were lessened by the advantages to be derived from the construction of the proposed improvement, conducted the mind of the late chief justice who presided at the trial in the Superior Court, to the conclusion that the sale was not authorized by law. In delivering the overruling opinion in this court, RUFFIN, C. J., declaring that "the legislature can prescribe what shall or shall not be the subject of execution," proceeds to say: "We agree that the franchise cannot be sold. It

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is intangible and vested in an artificial being, of a particular organization, suited in the view of the legislature to the most proper and beneficial use of the franchise, and therefore it cannot be assigned to a person natural or artificial, to which the legislature has not committed its exercise and emolument," and he adds: "We regret sincerely that it has hitherto escaped the attention of these companies and of the legislature, that some act was necessary, in order that such sales, when unavoidable, might be made with the least loss to the debtors and with the greatest advantage to the creditors and purchasers, by providing for keeping up the franchise with the estate."

The correctness of the general proposition that the property, real and personal, of corporations formed for the prosecution of objects of personal benefit, as that belonging to individuals, may be seized and by sale appropriated to the payment of its debts, does not admit of question. Between them the law makes no distinction, as has been repeatedly decided. *Maryland v. Bank*, 6 Gill & Johns. 205; *Ev. L., etc. v. Buf. Hyd. Association*, 64 N. Y. 561; *Queen v. Vict. Park Co.*, 41 E. C. L. 544. But so far as the opinion, except by force of the statute, extends the liability to the estate of corporations created for public purposes, indispensable to the exercise of the conferred franchise and to the performance of correlative duties, it is not in harmony with adjudications elsewhere of the highest authority, and we are not disposed to enlarge the sphere of its operation. Some of the cases on the subject will be noticed.

In *Ammant v. President, etc., Turnpike Co.*, 13 S. & R. 210; 15 Am. Dec. 593; the plaintiff bought at execution sale, "all the right, title, interest and claim," of the company, "of, in and to ten miles of its road," with specified limits, and it was held that he acquired no property by his purchase, TILGHMAN, C. J., declaring that "the inconvenience would be excessive, if the right of the company could be cut up into an indefinite number of small parts and invested in individuals," and that the turnpike company "alone were confided in, and they alone looked to, for a faithful performance of the important duties incumbent upon them."

In *Gue v. Tide Water Canal*, 24 How. 257, execution had been levied "on a house and lot, sundry canal boats, a wharf and sundry other lots," and an injunction asked to restrain the sale. Chief Justice TANEY, delivering the opinion, uses this language: "The property seized by the marshal is of itself of scarcely any value

apart from the franchise of taking toll with which it is connected in the hands of the company, and if sold under this *feri facias* without the franchise, would bring scarcely any thing, but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless," and he adds: "It would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders by dissevering from the franchise property which was essential to its useful existence."

In *Coe v. R. R. Co.*, 10 Ohio, 372, the rule is thus laid down: "When power is given to acquire an interest in real estate, for the single and exclusive purpose of the exercise of a franchise, and particularly when to acquire such interest there is a delegation of the power of eminent domain, the interest cannot be separated from the use to which alone it can be applied, and if the franchise cannot be conveyed, neither can the interest in real estate, with which it is connected."

A very forcible and clear view of the subject is presented by WOODWARD, J., in *R. R. Co. v. Colwell*, 39 Penn. St. 337. "Lands bought and not dedicated to corporate purposes are bound by the lien of judgments and are liable to be levied in execution and sold by the sheriff in the same manner and with the same effect as the lands of any other debtor. As to land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase or by exercise of the delegated power of eminent domain, the company hold it entirely exempt from levy and sale, and this on no ground of prerogative or corporate immunity, for the company can no more alien or transfer such land by their own act than can a creditor by legal process, but the exemption rests on the public interests involved in the corporation. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation. A railroad company could scarcely accomplish the end of its being after the ground on which its rails rest had been sold to a stranger."

"The road, with all its appurtenances," remarks SHARSWOOD, J., in the more recent case of *Youngman v. R. R. Co.*, 65 Penn. 278, "being necessary to the exercise of the franchise granted by the

sale, could not be levied on and sold under execution on a judgment against the corporation."

The distinction between corporate property which can and cannot be reached by a *fieri facias* is well defined and strongly presented in the opinion of THOMPSON, C. J., in a case determined in 1868 (*Foster v. Fowler*, 60 Penn. St. 27), in which, after discriminating between "those corporations that are agencies of the public, directly affecting it, and those which only affect it indirectly, by adding to its property in developing its natural resources or in improving its mental or moral qualities," he says: "Of the former are corporations for the building of bridges, turnpike roads, railroads, canals, and the like. The public is directly interested in the results to be produced by such corporations, in the facilities afforded to travel and the movements of trade and commerce. It is well settled that this use is not to be disturbed by the seizure of any part of their property, essential to their active operations, by creditors. They must recover their debts by sequestering their earnings, allowing them to progress with their undertaking to accommodate the public. This direct benefit to, and accommodation of, the public clearly distinguish this class of companies from the second class, viz.: private corporations, or those in which the public is but indirectly interested, such as mining and manufacturing, coal and iron companies, libraries, literary societies, schools and the like."

In our researches we have met with a single case, *Arthur v. Bank*, 9 Sm. & Mars. 394, recognizing the authority and approving the decision in *State v. Rives*, and in opposition to the current of judicial opinion.

The general words of the statute, which to some extent influenced that decision may without violence to their meaning admit of a narrower scope and be restricted to the property of private corporations, and to that of public corporations, which may be replaced, and is not indispensable to the exercise of their necessary functions and the discharge of public duties, upon the distinction taken in the cases cited. But we are not required to question the correctness of the construction which so widely extends the application of the law. It has since been amended in accordance with the suggestion of the chief justice and the very remedy pointed out has been given. The franchises of a class of corporations, to which that then under consideration belongs, with all the corporate property may now be reached and its profits applied to the satisfaction of

the claims of creditors. To the section, remaining substantially unchanged, has been added the following: "And if the judgment or decree be against a railroad, or other corporation authorized to receive fare or tolls, the franchise of such corporation, with all the rights and privileges thereof, so far as relates to the receiving of fare or tolls, and also all other corporate property, real and personal, may be taken on execution and sold, under rules regulating the sale of real estate." Rev. Code, ch. 26, § 9. The amendments further provide for the manner of selling and that the sheriff shall "deliver to the purchaser possession of all the corporate property connected with the franchise belonging to such corporation in whatever county the same may be situated." §§ 10, 11.

In furtherance of the same policy of preserving intact the corporate privileges bestowed for the public benefit, it has been enacted that purchasers of the property at a mortgage sale shall *ipso facto* become a body corporate and "succeed to all such franchises, rights and privileges, and perform all such duties" as the preceding corporation possessed, except that they shall not incur liability for its obligations. Bat. Rev., ch. 26, §§ 46, 47.

It will be observed that the subjection of the franchise to execution is confined to such corporations as may "receive fare or tolls," leaving all others to the operation of the pre-existing law, and both acts look to the continued association of the property with the franchise. Thus the public interests remain unaffected by proceedings that result in a change of ownership merely, and a transfer of public duties from one to another party. This legislation springing out of the decision in *Rives'* case, and intended to obviate the inconveniences of a disruption of the company and the loss of those facilities for travel and transportation which it had afforded, must, we think, be deemed an expression of the legislative will, to substitute the new in place of the former remedy. It secures to creditors all their just rights, yet in subordination to the higher public demand for an unobstructed road, and without wrong to those from whom the land has been taken and appropriated to its use. It must therefore be declared that the plaintiff acquired no estate in the land by virtue of the sale and sheriff deed. It is unnecessary to pass upon the other defense. According to the case agreed, a nonsuit must be entered and it is so ordered.

Judgment reversed.

Error.

COTTEN V. WILLOUGHBY.

(88 N. C. 75.)

Mortgage—of growing crop.

A mortgage of a growing crop is valid.*

CLAIM and delivery. The question was as to the validity of a mortgage, executed by the defendant, on May 26, 1876, of the "crops to be cultivated and made" upon a certain farm during that year. The defendant had judgment below.

W. B. Rodman and Reade, Busbee & Busbee, for plaintiff.

SMITH, C. J. [After stating the case.] The purpose of the present suit is to recover possession and control of the property in order to the execution of the trusts with which it is clothed, and if under the deed the title and right of possession are vested in the plaintiffs, as trustees, the action has been well brought, and the judgment rendered is wholly erroneous. The first inquiry then is as to the effect of the deed upon the property therein described.

No doubt whatever can be entertained as to the transfer of the legal title to such articles as were then *in esse* and upon which the conveyance could directly operate. The words used are appropriate to the object intended and the possession is necessary to the discharge of the trusts.

In our opinion, for the purposes of the suit, the same results must be ascribed to the operation of the instrument upon the growing or to be grown crops upon the farm. The lien given upon them, to be effective, requires control and possession in the mortgagees; for how otherwise could they be sold and the proceeds applied to the debt? And this is rendered manifest by the very authority given to take possession after the first day of November. 1 Jones Mort., § 60. As this is the intent of the deed, can it have that effect upon a planted crop (for it must be assumed that the planting was prior, according to the course of husbandry, to the making of the conveyance), and does a possessory right thereto vest in the trustees at or before the maturity of the crops?

*See *Moore v. Byrum* (10 S. C. 425), 30 Am. Rep. 58, and note, 61.

The authorities referred to in the brief of the plaintiffs' counsel fully support the affirmative of the proposition involved in the inquiry. While it is true that what has no existence, and whose future acquisition is uncertain and contingent, cannot be assigned by words of present conveyance, and a contract relating thereto is entirely executory, there is an exception in the case of the future products of a substance which has ownership, and as to incidents, have a potential and prospective existence, admitting of transfer by the owner of the property from which they spring.

"So also, although the subjects of sale have no present existence," says Judge STORY, "yet if it be the natural product or expected increase of something to which the seller has a present valid right, the sale will be good. Thus a valid sale may be made of the wine a vineyard is expected to produce, or the grain that a field is expected to grow; or the milk that a cow may yield during the coming year; or the future young that may be born of the sheep owned by the vendor at the time of the sale, or the wool that shall grow upon them." STORY on Sales, § 185. To the same effect, BENJ. on Sales, 63, 64.

In *Butt v. Elliott*, 19 Wall. 544, the Supreme Court of the United States declared that while the mortgage clause in the instrument "could not operate as a mortgage because the crops to which it relates were not then in existence, when the crops grew the lien attached and bound them effectually from that time." And the doctrine has been carried so far as to hold the future acquired property of a railroad company embraced in a grant of "all present and future to be acquired property" of the corporation, incident to the use of the road. *Pennock v. Coe*, 23 How. 128; *Dunham v. Railway Co.*, 1 Wall. 254; *Robinson v. Ezzell*, 72 N. C. 231.

As then the plaintiffs by the terms of the deed were "lawfully entitled to the possession" of the goods and can maintain the action for claim and delivery under section 177 of C. C. P. the judgment rendered must have been based on the opinion that the deed in its inception was void by reason of the fraud superinducing its execution, or became so afterward by the plaintiffs' non-compliance with their stipulation for supplies, operating as a defeasance of the grant.

While we do not concede that the plaintiffs' previous false assurances and unfulfilled promise (and such is in substance the averment in the answer) can have this annulling effect upon an executed

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contract by which property passes, and still less that a mere subsequent violation of the promise can restore it to the assignor, it is sufficient to say that the imputed fraud has not been found by the jury nor facts stated in the case from which it can be inferred, and its existence rests entirely upon the disputed assertions of the defendant alone. The verdict simply ascertains the deficiency in the amount of the supplies that ought to have been provided, a breach of the plaintiffs' contract only, and this does not authorize the conclusions upon which the judgment depends for support. As the facts of the case presented in the appeal do not raise the question perhaps intended to be presented on the appeal, nor warrant the judgment, it must be reversed and the cause remanded in order to the further necessary findings to determine the rights of the respective parties.

It may not be amiss to observe that if the plaintiffs recover, they will hold as trustees, and as all interested in the fund are before the court we see no reason why in the present proceeding the mortgage may not be foreclosed, the equities involved adjusted and the whole matter finally adjudicated in the action. It is unnecessary to consider the question of evidence in this aspect of the case. Judgment reversed and new trial granted. Let this be certified.

Error.

Venire de novo.

SIMMONS V. TAYLOR.

(83 N. C. 143.)

Removal of cause.

In an action of trespass on land a non-resident defendant sued with residents may remove the cause to the Federal court so far as he is concerned.*

PETITION for removal of a cause to the Circuit Court of the United States. The opinion states the facts. The motion was denied.

James E. Moore, for plaintiffs.

E. G. Haywood, for defendant.

* See *Steward v. Mordecai* (40 Ga. 1), 2 Am. Rep. 355.

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SMITH, C. J. The defendants, one of whom is a citizen of Virginia and the other of this State, are sued by the plaintiffs, all of whom are citizens of North Carolina, for trespasses alleged to have been committed upon their lands. The defendants in separate answers deny the plaintiff's right to the land in dispute, and assert title in the defendant Taylor, by whose authority and in whose service the defendant Robeson was acting.

At the return term of the summons Taylor applied by petition for the stay of proceedings in the cause and its removal to the Circuit Court of the United States, on the ground of his own citizenship in Virginia and because the principal controversy is between the plaintiffs and himself, and setting out the other facts material to the motion. No objection is made to the form of the application, and the simple question, ruled adversely to the defendant in the court below, is presented — whether the entire cause, or so much of it as involves the controversy between the plaintiffs and himself, is removable under the acts of Congress.

The 12th section of the judiciary act of 1789 authorized a defendant under the limitations therein mentioned, when sued in a court of the State of which the plaintiff was a citizen and himself a citizen of another State, to have the same removed to the Circuit Court of the United States, if he made his application at the return term of the writ or process.

The act of July 27, 1866, extended the right of removal to one of several defendants, although the others might be citizens of the same State with the plaintiff, if application was made before the trial, when, so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy so far as concerns him, without the presence of the other defendants as parties in the cause. But the suit as to the other defendants remains in the State court and may be prosecuted there.

The amendatory act of March 2, 1867, authorizes a removal whenever there is a suit depending in the State court between one of its citizens and a citizen of another State, whether the latter be plaintiff or defendant, when he files an affidavit stating that he has reason to believe and does believe that from prejudice or local influence he will not be able to obtain justice in the State court. Rev. Stat. of U. S., § 639. So the law remained until the passage of the

act of March 3, 1875, the second section of which is in these words:

"That any suit of a civil nature at law or in equity, now pending or hereafter brought in any State court, when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming land under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the Circuit Court of the United States."

In his analysis of the act of 1866 Judge DILLON, in his monogram or short treatise on the Removal of Suits (19), says the conditions of removal are these:

1. The suit in the State court must be by a plaintiff who is a citizen of the State wherein the suit is brought.
2. It must be against a citizen of the same State and a citizen of another State as defendants.
3. The amount in dispute must exceed the sum or value of five hundred dollars besides costs.
4. The removal must be applied for before the trial or final hearing in the State court.

And that in such case the non-resident defendant may have the cause removed (not wholly) but only so far as it relates to himself, if it be a suit brought to restrain or enjoin him, or is a suit in which there can be a final determination of the controversy so far as concerns him without the presence of the other defendants as parties in the cause. In the opinion of the author referred to, the act of 1875, which repeals the former acts in conflict, does not repeal the substantial provisions of the act of 1866, and a case coming under its operation may be removed as before. *Id.* 28.

If we accept this as a correct interpretation of the state of the

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law, the defendant Taylor is clearly entitled to remove so much of the action as relates to himself, as he, a citizen of Virginia, is sued by citizens of North Carolina with his co-defendant, a resident of the latter State, in an action several in its nature, and which can be maintained against either, and therefore in the language of the act "there can be a final determination of the controversy as to him without the presence of the other, and the suit may proceed against the latter." *Sewing Machine Cos.*, 18 Wall. 583; s. c., 110 Mass. 70.

The next inquiry is whether under the act of 1875 the whole cause is removable at the instance of the non-resident defendant entitled to remove it as to himself.

The operative and distinguishing words of this enactment are that the entire suit may be removed when there is a "controversy which is wholly between citizens of different States," and that although there may be other distinct controversies with those who, if they were the only plaintiffs or only defendants, would not be entitled to the removal.

This act came under review in the case of *Taylor v. Rockefeller*, in the United States Circuit Court for the western district of Pennsylvania, reported in 18 Am. Law Reg. 298, before Mr. Justice STRONG of the Supreme Court, and Judge McKENNON, in which an elaborate opinion concurred in by both, is given. After remarking that the act adopts the language of the Constitution and goes to the extreme limit of the jurisdiction authorized to be conferred, he proceeds to discuss the provisions of the act and says: "In many writs there are numerous subjects of controversy, in some of which one or more of the defendants are actually interested, and other defendants are not. The right of removal is given when any one of these controversies is wholly between citizens of different States and can be fully determined as to them, although there may be other defendants actually interested in the controversies embraced in the suit."

In *Peterson v. Chapman*, 13 Blatchf. 395, the action was brought by citizens of New York against parties, one of whom resided in New York and the other in Connecticut, and the cause after removal was remanded to the State court on the ground that the controversy was not between citizens of different States.

In *Carrahan v. Brennan*, in the Circuit Court of the northern district of Illinois, it was held that the removal is allowable only when the controversy is so completely between citizens of different

States that its termination as to them will settle the whole suit, and not a part of it can be removed.

And so Mr. Justice BRADLEY expressed the opinion (*Gerardy v. Morse*, 4 Am. Law Times, 387), that under the act of 1875, all the plaintiffs need not have a different citizenship from all the defendants, and if some of the plaintiffs and defendants are citizens of the same State, the removal must be sought by all the plaintiffs or all the defendants, and that one alone could not remove the cause; but if all the plaintiffs and all the defendants are citizens of different States, any one of them may remove.

Amidst these diverse views and in the absence of any authoritative construction of the act to guide, we are required ourselves to ascertain its meaning and effect. The action before us is in its nature severable and for trespasses of which both, neither, or only one defendant may be guilty; and the disposal of the issue as to one in no manner affects the liability of the other, when they are allowed separate trials. The case is clearly within the contemplation of the act of 1866 and admits of severance and removal of so much of the cause as relates to the non-resident defendant. The application does not seem to fall within the meaning of the latter act, which authorizes the removal of the entire cause, when there shall be a controversy which is "wholly between citizens of different States." This is not such a controversy; it is one and the same and equally with both defendants divisible into parts, but the same against each. While then the non-resident may have his motion granted for himself, the resident defendant is left to combat the plaintiff's claim in the jurisdiction first attaching. The cases in our own reports do not aid us in the inquiry.

We are therefore of the opinion that the refusal of the court to remove on the application of the defendant Taylor, the case as to him was erroneous and it is reversed. This will be certified to the court below.

Judgment reversed.

Error.

HOWARD V. STEAMSHIP COMPANY.

(88 N. C. 158.)

Carrier — freight — delivery at wrong place.

Plaintiff consigned freight by defendant's boats to W. at G. By arrangement between W.'s agent and defendant, of which plaintiff was ignorant, defendant landed the freight on the river bank near W.'s house, and not at G. W. refused to pay charges and take the freight, and defendant subsequently permitted another, unauthorized by W., to take it on paying charges. The plaintiff had no notice of the disposition of the freight. *Held*, that plaintiff could recover the value from defendant.

ACTION of damages for non-delivery and loss of freight. The opinion states the facts. Defendant had judgment below.

Howard & Nash, for plaintiff.

W. B. Rodman, for defendant.

SMITH, C. J. In January, 1878, the plaintiff put on board the company's steamer, a passenger and freight boat running on Tar river between Tarboro and Washington, passing the town of Greenville, certain iron to be conveyed and delivered to William Whitehead at the last named place. There was an understanding between the defendant's agents in charge of their steamer and Whitehead that all freight transported on the boat for him should be landed at Clark's banks on the river, near which he resided, and notice given by three blasts from the steamer's whistle, and the articles were put ashore in accordance with this agreement. Whitehead, a few days after, on being presented by a collecting agent of the company with bills for the goods and for freight, refused to pay either, saying he had ordered no such goods, should not take them nor pay for their transportation. The iron was then at Clark's landing and remained there a week longer when one Butts, without authority from Whitehead or the plaintiff, called on the captain of the boat, paid the freight charges and took and carried away the goods. No information was given to the plaintiff of the disposition of the iron, nor did he know of the special arrangement with Whitehead as to the manner and place of delivery of goods intended for him. The action is for damages for the loss of the iron and the breach of the contract of carrying.

The only question to be decided is whether the variation in the place of delivery, under the special arrangement with the consignee, of freight intended for him, is admissible against the owner and relieves the defendant from liability to the plaintiff. The iron did not belong to Whitehead, was not sent by his order, nor consigned by his consent, and can scarcely come within the provisions of an agreement applicable to his own property only. The contract of affreightment was not under his control, nor any deviation from its terms allowable without the plaintiff's assent. It was made with the plaintiff alone, and explicitly required the transportation and delivery at Greenville and not at any intermediate point. The defendant's agent knew of the consignee's refusal to receive the goods and to pay for them or the freight due, and makes no communication of the fact to the plaintiff, nor any effort to secure the safety of the goods, although the boat made trips on alternate days between the termini of its established route. The freight is at last received from a stranger and the goods, after remaining an entire week on the river bank unprotected, pass, without objection, into his possession, are taken away and converted to his own use. Had they been carried to Greenville and refused, it would have been the clear duty of the carrier to deposit them in a warehouse or other place for safe keeping. This security was not afforded on the river shore where they were left and suffered to remain, exposed and without any protection.

In our opinion the private and special arrangement with Whitehead as to his property (and that the iron was not his was made known when he repudiated the consignment) cannot excuse the defendant in his thus dealing with what belonged to the plaintiff, from the obligation of the contract with him, and still less for the subsequent inattention and negligence in providing for its safety, or giving information to the plaintiff to enable him to do so. When the consignee cannot be found or declines to receive the goods conveyed, the carrier must still take care of them, at least for a reasonable time and communicate with the owner. 2 Redf. on Railw. 66.

The case of *Sweet v. Barney*, 23 N. Y. 335, seems to be repugnant to the views we have expressed and the court there say: "The consignee is the presumptive owner of the thing consigned, and when the carrier is not advised that any different relation exists, he is bound so to treat the consignee."

In this case the package of money was not placed in charge of

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the officers of the bank at their banking-house, but was put in possession of the porter at another place, in conformity with its usages and an often recognized agency of the porter to receive and deliver funds sent to the bank, and it was stolen from him. It is held after three arguments, by a majority of the court, that the defendant did not deliver the money over and was responsible in damages for the loss. There is a strong dissenting opinion of Judge DAVIES, in which, referring to the defense set up and sustained by the other judges, he says: "It would seem to be a sufficient answer to the defense to say that such was not the contract made by the defendants with the plaintiffs, and that they have no legal right to make a new contract, or do something which they contend is equivalent to that undertaken to be done by them. There is no pretense that the plaintiffs were parties to any such modification of the contract made, or had any knowledge of it, or in any manner assented to it. Nor can it be alleged that the custom of the defendants in delivering packages to the parties at places other than the bank can have any effect on the rights of the plaintiffs. As between the defendants and the bank it has significance, as to the parties to the contract it is *res inter alios acta*, and the plaintiffs are not deprived of any of their rights by reason of it."

This is a forcible presentation of the matter, and without giving it full concurrence, we may say that our case has an essential and distinguishing feature in that there has been no delivery to any one, but an abandonment upon an exposed river bank, without a provision then or afterward, where its perils were known, for the preservation or safety of the property, and we will add almost an implied assent to its removal and conversion by a stranger. The unreasonable pretext for this violation of duty and utter indifference to the owner's interests is put upon an arrangement with one who disavows the entire transaction in regard to his own transported property.

We think upon every principle of law and for reasons of sound policy, the defendant is responsible in damages to the plaintiff. The judgment is reversed, and judgment will be entered for the plaintiff for the agreed value of the lost goods as stated in the case.

Judgment reversed.

Error.

TURNER V. GAITHER.

(88 N. C. 371.)

Infancy — necessities — money for professional education — ratification.

An infant may avoid his bond for money loaned him by his father's administrator to enable him to acquire a professional education, and his mere acknowledgment of the debt after majority, without an express promise to pay, is not a ratification.*

ACTION on sealed notes. The material facts of the defendant's letter to the plaintiff, referred to in the opinion, are as follows: "According to my memory, Mr. W. Turner has very small claims against me, as the principal of the note given him has been paid. The other papers are certificates merely showing that one J. B. Gaither" (the defendant) "received so much as a part of his interest in A. B. F. Gaither's estate, to be accounted for on final settlement. Over three years ago I told Mr. W. Turner I was ready to settle whenever he showed me (the oldest heir) what went with the effects of said estate. I say so still, and claim a right to know. I do not say that Mr. Turner has acted dishonestly, but I want him to prove to me by showing accounts that he has acted honestly. I am not satisfied, nor will I be, until I see both sides of the books. I must sooner or later see the records of A. B. F. Gaither's estate. Name the place and I will make my arrangements and meet you, W. Turner, with any one you may select, to have a fair and square investigation, and do not say as before that it is none of my business what went with the estate. You had no right to a cent from any of us until you showed us where our estate had gone. The law says not, and let us abide by the law. Come square to the point, business is business, let us settle in a business-like manner." The other facts are set out in the opinion. Judgment below for the plaintiff.

J. M. Clement, for plaintiff.

J. M. McCorkle, for defendant.

* See note, 25 Am. Rep. 30.

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SMITH, C. J. The action is brought on several notes under seal and accountable receipts, all of which, except the note bearing date October 30, 1869, and a small sum not disputed, were executed during the minority of the defendant to the plaintiff, administrator of A. B. F. Gaither, his father. The defenses set up in opposition to the recovery are infancy and the bar of the statute of limitations. Upon an account ordered and reported during the progress of the cause between the plaintiff and his intestate's estate, it appeared that the assets had been administered and a large indebtedness still remained unsatisfied. The moneys for which the notes and receipts were given were used by the defendant in defraying his expenses in procuring a medical education in Philadelphia, and he had no other means than those furnished by the plaintiff for that purpose. The plaintiff insisted that the debt thus incurred was for necessities, and relied on a letter addressed to him by the defendant in June, 1876, eight years after he arrived at full age, as evidence to repel the bar of the statute and as a ratification of the contract.

Several issues were submitted to the jury, and their responses in substance are that the defendant was under twenty-one years of age when the contracts were entered into; the moneys furnished were necessities; the statute of limitations is not a bar, and the defendant has since attaining majority ratified and confirmed the contracts.

During the trial the defendant's counsel asked the court to charge the jury that "there is no evidence tending to show that the money furnished the defendant was for necessities, the intestate's estate being insolvent, and that money advanced or loaned was not in itself within the meaning of the term *necessaries*, for which an infant can incur a binding obligation."

The further instruction was also asked that the failure of the plaintiff to make his final settlement of the intestate's estate until 1874, eight years after the grant of administration, let in the statutory bar to the accountable receipts and prevented a recovery on them. The court declined so to charge and told the jury that the defendant's letter "amounted to a ratification of the notes and claims given by defendant to plaintiff and also repelled the statute of limitations."

There was judgment rendered on the verdict against the defendant and he appeals.

1. Were the moneys thus furnished and used in contemplation

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of law necessities for the infant, and is his contract to pay therefor valid against him? "Necessaries" are defined by Mr. Greenleaf to be "such things as are useful and suitable to the party's estate and condition in life and not merely such as are requisite for bare subsistence," and he cites as illustrations of the proposition that regimentals for an infant member of a volunteer military company, a livery for a minor captain's servant, a horse for an infant nearly of age, for exercise under a physician's advice, have been held to be included in necessities, while money lent to supply them was not, unless actually used in their purchase. 2 Greenl. Ev., § 365.

The doctrine with more strictness is thus laid down by PEARSON, J.: The general rule is that the contract of an infant is not binding on him. The exception is that an infant is bound to pay for goods sold and delivered to him, provided they are necessary for his support. This is put on the ground that unless an infant can get credit for necessities he may starve, or as it is expressed in some of the cases, an infant must live as well as a man; therefore the law gives a reasonable price to those who furnish him with necessities *ad victum et ad vestitum*, that is for victuals and clothes. Lord COKE says (Co. Lit. 172 a), "it is agreed by all the books that an infant may bind himself to pay for his necessary meat, drink, apparel, physic and other necessities." These last words embrace boarding, for shelter is as necessary as food and clothing. They have also been extended so as to embrace schooling and nursing (as well as physic), while sick. In regard to the quality of the clothes and the kind of food, etc., a restriction is added that it must appear that the articles were suitable to the infant's degree and estate." It was accordingly held that timber for building a house of the value of \$55 was not a necessary for which the defendant could be charged, although the house built was appropriate to his estate and station in society, and he had no other. *Freeman v. Bridger*, 4 Jones, 1.

The incapacity imposed upon an infant with the exception as thus explained, extends equally to expenses incurred in acquiring a professional education, and more certainly to money loaned for that purpose,* which, however desirable for those whose means will admit, are not, in the sense of the law, necessities for which the infant may enter into a valid obligation, and we are not at liberty

* *Contra*, as to money lent a married woman to buy necessities, and appropriated to that purpose. *Kenyon v. Farrie*, 47 Conn. 510.

to enlarge the operation of the exception. In this case the defendant had no estate whatever, and his expectation of deriving something from his father's estate, encouraged, as it would seem from the form of the receipts by the plaintiff himself, has proved fruitless. *Hyman v. Cain*, 3 Jones, 111; *Jordan v. Coffield*, 70 N. C. 110.

2. Does the letter afford sufficient evidence of an intended ratification so as to bind the defendant to the fulfillment of the several contracts?

We are of opinion there is error in the ruling of the court upon this question also, and as to the effect of the evidence in sustaining the finding of the jury upon the second issue. "There is a distinction," says the learned author from whom we have before quoted, "between those acts and words which are necessary to ratify an executory contract and those which are sufficient to ratify an executed contract. In the latter case any act amounting to an explicit acknowledgment of liability will operate as a ratification; as in the case of a purchase of land or goods, if after coming of age he continues to hold the property and treat it as his own. But in order to ratify an executory agreement, made during infancy, there must not only be an acknowledgment of liability, but an express confirmation or new promise voluntarily and deliberately made by the infant upon his coming of age, and with the knowledge that he is not legally liable. An explicit acknowledgment of indebtedment, whether in terms or by a partial payment is not alone sufficient; for he may refuse to pay a debt which he admits to be due." 2 Greenl. Ev., § 367.

To the same effect are the rulings in this state as a few references will show: "An examination of the authorities applicable to this question" (ratification), says TAYLOR, C. J., in *Alexander v. Hutchison*, 2 Hawks, 535, "leads irresistibly to the conclusion that the law is in favor of the defendant, and that the jury ought to have received an instruction that nothing short of an express promise to pay, made by the defendant after he had attained his age of discretion, would be sufficient to render him liable in this action." HENDERSON, J., in an opinion in the same case uses similar language: "This is unlike the promise which revives the remedy when barred by the statute of limitations, where the bare acknowledgment of an unsatisfied consideration is sufficient; for in this case there must be a new promise, an actual responsibility assumed after arriving at

full age;" and he adds, "anything either by words or acts which amounts to an assumption or promise of the debt is sufficient."

When the same case came again before the court (1 Dev. 13) the chief justice, correcting the misapprehension of the judge who tried it in the court below, who instructed the jury if they believed the witness to find a verdict for the plaintiff, thus explains his former opinion: "It should, I think, have been left to the jury to determine whether they would infer from the defendant's behavior a clear and unequivocal assent to and ratification of the contract. Any act or conduct on his part, denoting a full assent of the mind and leaving nothing to doubt and conjecture without the utterance of any words, would be sufficient to warrant such an inference." HENDERSON, J., taking the same view, remarks: "When it is said that an implied promise will take a case out of the statute of limitations but that it requires an express promise, after full age, to bind a person to the performance of a contract, made during his minority, all that is thereby meant is that in the first case the law will make the promise if there is an acknowledgment of a sufficient consideration; in the latter case the party must make it himself."

So in *Dunlap v. Hales*, 2 Jones, 381, an infant who had purchased and given bonds for two slaves, after reaching full age wrote proposing to return the slaves and pay half the debt, and added, "if they will not accept the above offer I will have to pay them, I suppose, but I shall do so at my convenience, as it will be nothing less than a free gift on my part, the negroes being entirely worthless;" and it was decided that the defendant had not thereby rendered himself liable.

We have reproduced so largely from the opinions of the eminent judges who formerly presided in this court, because they contain a clear and forcible presentation of the law on the subject. The letter produced falls short of these requirements, and still less authorizes an instruction that it is itself a ratification. Without detaching single paragraphs which are supposed to involve an assumption of liability, its tone is querulous throughout, complaining of mismanagement and waste of the assets as reasons why the defendant was unwilling to pay the debts. Upon no fair and reasonable construction of the letter as a whole does it admit a liability or assume the payment of the debt to be so declared to the jury. At most it was but evidence to be submitted to the jury and to be

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considered and weighed with any other offered that might bear upon the question. While it may not have been necessary to pass upon the alleged confirmation, yet as the error was committed in answer to a refused prayer for an instruction and is thus presented for review in the appeal, and the decision of the point may contribute to an early final settlement of the controversy, we have deemed it proper to dispose of that matter also.

There is error and there must be a *venire de novo*, and it is so adjudged.

Error.

Venire de novo.

GREEN V. GREENSBORO FEMALE COLLEGE.

(88 N. C. 449.)

Statute of limitations — payment of interest by principal — effect on surety.

Payment of interest on a note by the principal maker, before the statute of limitations has run against it, takes the note out of the operation of the statute as to a surety upon the note.*

ACTION on a promissory note made by a principal and several sureties. Defense, statute of limitations. The annual accruing interest was regularly paid by the principal debtor, up to and including the year ending November 7, 1877, and was credited on the note; the sureties knew nothing of these payments; and the payee did not know from whom they came. The opinion states the facts. Judgment for the plaintiffs.

Davis & Cooke, for plaintiffs.

Gray & Stamps, for defendants.

SMITH, C. J. [After stating the facts.] The sureties are discharged by the delay in bringing the action within three years after the maturity of the note (C. U. P., § 34, ¶ 1), unless the payments made in the meantime prevent that result under section 51. The sole question then is, do these payments repel the statutory bar as to the sureties as well as to the principal in the note?

* See note, 28 Am. Rep. 514.

The law is well settled by adjudications in England and in this State, that a partial payment by one of several makers of a promissory note given for a specific sum takes the case out of the statute as to all, and a like effect follows the payment of interest. *Brown Act. at Law*, Law Lib. 90.

The indorsement of such payments, before the expiration of the time limited for bringing the action, and when the entry is against the interest of the creditor, is received as evidence of the fact that the money was paid. The rule is founded upon the community of interest among the debtors and the presumption that no one would make a false admission against his own interest. 2 *Greenl. Ev.*, § 444; *Woodhouse v. Simmons*, 73 N. C. 30.

The same doctrine is declared by this court in *Davis v. Coleman*, 7 Ired. 424; *McKesthan v. Atkinson*, 1 Jones, 421; *Lowe v. Sowell*, 3 id. 67, and in other cases.

In *Lowe v. Sowell*, PEARSON, J., thus expresses the opinion of the court: "In an action on a joint and several bond, the idea that a plea of payment can be true as to one and not true as to another defendant, necessarily involves a contradiction; because payment by one obligor discharges the debt, and in the very nature of things must support the plea as to all the obligors. An action may be barred as to one defendant and not as to another; but a debt cannot be paid as to one defendant and unpaid as to another."

This was the legal effect of a partial payment in rebutting the presumption of full payment, arising under the statute from the lapse of time unexplained. But it was also decided in numerous cases that a promise by one member of a partnership firm after its dissolution to pay a partnership debt, revived the liability of the other member as well as his own; and in like manner the promise of one maker of a promissory note, made before the statutory bar was reached, arrested the running of the statute as to all, and made the time of such promise a new starting-point. *McIntyre v. Oliver*, 2 Hawks, 209; 11 Am. Dec. 760; *Willis v. Hill*, 2 D. & B. 231; *Walton v. Robinson*, 5 Ired. 341; *Davis v. Coleman*, 7 id. 424.

In consequence of these rulings, the general assembly in 1853 passed an act that no acknowledgment or admission of a partner after the dissolution of the firm, or of a maker of a promissory note after the statutory bar obstructed a recovery, should repel the statute as to the other partners or the other makers. *Rev. Code*, ch. 65, § 22.

The purpose and meaning of the act are to withdraw the power of one member of a dissolved partnership, by his acknowledgment or promise to continue or revive the liability of the other, and of a maker of a note by the same means, to remove the protection which the statute had secured to the other makers. It does not undertake to interfere with the legal force and effect of a recognition of the debt by the payment of a part of it.

Such was the state of the law when the new limitations prescribed in the Code superseded those previously existing in their application to causes of action thereafter accruing. By the new statute it is declared that "no acknowledgment or promise shall be received as evidence of a new or continuing contract whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest." C. C. P., § 51.

We are aware of no case in which this clause has been construed by this court, and as it is silent as to the effect a part payment upon the others, we may be aided in examining the adjudications in England upon a very similar enactment in ascertaining its true meaning.

In *Wyatt v. Hodson*, 21 E. C. L. 302, Chief Justice TILDEN speaks as follows: "Then with respect to payment of principal or interest it provides that 'nothing herein contained shall alter, take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever,' not confining the effect to the individual paying. Why? Because the payment of principal or interest stands on a different footing from the making of promises which are often rash or ill interpreted, while money is not usually paid without deliberation; and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment. * * * On the broad construction of the act, we think payment of money by one of several joint contractors not within the mischief or the remedy provided by the legislature against the effect of an oral promise."

More directly in point is the case of *Channel v. Ditchburn*, 5 M. & W. (Exch.) 494, in which PARK, B., says: "Since the decisions in *Atkins v. Tredgold*, and *Slater v. Lawson* (cited in the argument), the Court of King's Bench have twice decided that payment by one of two joint makers of a promissory note is sufficient to take the

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case out of the statute as against the other. The first of these cases was that of *Burleigh v. Stott*, where the defendant was sued as the joint and several maker of a promissory note, and there the court held that payment of interest by the other joint maker was enough to take the case out of the statute as against the defendant; and that it was to be considered as a promise by both so as to make both liable. Since this decision, the Court of King's Bench have come to the same conclusion in the case of *Manderston v. Robertson*, 4 Man. & Ryl. 440."

Referring to a distinction in the argument drawn between payments made before and after the statute had run, he adds, that in *Manderston v. Robertson* the payment was made after the six years had elapsed, and yet it was held to be sufficient.

The reservation contained in the section leaves to a partial payment the force and effect unimpaired, which the act before possessed, in continuing the common liability in the light of the decisions to which we have adverted. The act of 1852 in terms confines to the person making an acknowledgment or admission, or doing an act which recognizes the obligation before the bar interposes against a recovery, the legal consequences flowing from either, but does not include such as may be made or done before, and hence does not apply to the facts of the present case.

Upon a full and careful review, we are of opinion and so declare, that the payments of interest on the note, before it was barred by lapse of time, arrested the operation of the statute as to all the makers, sureties as well as principal, and it commenced again to run only from the day when the last payment was made.

This being the ruling of the court below, there is no error and the judgment must be affirmed.

Judgment affirmed.

No error.

 FIRST NATIONAL BANK OF CHARLOTTE V. LINEBERGER.

(88 N. C. 454.)

Surety — indulgence by creditor to principal — usurious consideration.

An indorser is not discharged by an agreement of indulgence by the creditor to the principal debtor founded upon a usurious consideration paid in advance, and reserving his rights and remedies against the indorser. (*See note p. 585.*)

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ACTION on promissory note against indorser. Defense, that after the note became due, and without the knowledge or consent of defendants, plaintiff, for a valuable consideration, made an agreement with the makers, whereby they agreed to extend the time for the payment of the note by the makers for thirty days or more. Thereupon the following issues were submitted to a jury:

1. Did the plaintiff at or before the maturity of the note sued upon receive from the makers thereof interest thereon in advance, and if so, when, at what rate, and for what time? Answer — They did; one and one-half per cent per month from maturity until January, 1876.

2. Did plaintiff, in consideration of the payment of interest in advance on the note sued on, agree with the makers to forbear the collection of said note for the time for which interest was so paid? Answer — They did.

3. Did the defendants have any knowledge of or assent to such agreement to forbear? Answer — They did not.

4. Did the plaintiff at the time of the agreement to forbear as to the maker, reserve its rights and remedies against the indorser? Answer — Yes.

5. Has the note or any part of it been paid? Answer — Yes; amount \$71.55.

Upon this finding of the jury there was judgment for the plaintiff.

Bynum & Grier, for plaintiff.

A. Burwell and Jones & Johnston, for defendants.

ASHE, J. There was no exception taken on the trial to the issues submitted to the jury nor to the ruling of the court upon the introduction of evidence, and the only question for our consideration is, was there a proper judgment rendered upon the finding of the jury.

The principle is well settled that where time or forbearance is given by the creditor to the principal debtor, by a promise or contract which binds him in law and would bar his action against the debtor, the surety is discharged. Because it essentially varies the terms of the original obligation which ceases to be that for the due discharge of which he became surety, and would deprive the surety of the power of instantly saving himself by suit against the debtor,

if he should be forced to pay the debt. Pars. on Notes and Bills, 259; Dan. on Neg. Inst., § 1312; Story on Notes, § 14.

But this general principle is subject to qualification. The surety will not be discharged by indulgence given to the principal when at the time of the agreement for forbearance there is an unqualified reservation of the creditor's rights and remedies against the surety. The reason assigned for this doctrine is that the reservation rebuts the implication that the indorser was meant to be discharged, and prevents the rights of the indorser against the maker being impaired. For the indorser after such an agreement may immediately pay the debt and bring his action against the maker, and his consent that the creditor shall reserve his remedy against the indorser is impliedly a consent that such indorser shall have recourse against him. *Evans v. Raper*, 74 N. C. 639; *Rees v. Bennington*, White and Tudor, Hare and Wallace Notes, 382; Dan. on Neg. Inst., § 1322; Story on Notes, § 416. These authorities fully sustain the judgment of his honor in the court below, upon the finding of the jury upon the issues submitted.

But there is still another view of the case which is equally strong in support of the judgment of the Supreme Court.

To make an extension of time to the debtor have the effect of exonerating the indorser or surety, it is not merely necessary that there should be an agreement which varies the original contract by postponing the time for its performance beyond that fixed originally by the terms of the obligation, but the agreement for indulgence, if not under seal, must be founded upon a sufficient consideration. It must be such as is legally binding upon the creditor, one that the debtor may enforce against him, either as a cause of action or as a defense, for if he could not the surety or indorser will not be discharged. Pars. on Cont. 240; Dan. on Neg. Inst., § 1315, and *Rees v. Bennington*, *supra*, 383. Hence it must be that if the consideration for the forbearance be usurious, when such a contract is void by law, the agreement will not discharge the indorser. *Rees v. Bennington*, *supra*, 384, and cases there cited in note; Dan. on Neg. Inst., § 1317; *Richmond v. Standcliff*, 14 Vt. 258; *Vilas v. Jones*, 1 Comst. 286, 287.

In this last case BRONSON, J., who delivered the opinion of the court, in reference to some contrariety in the decisions of some of the courts, with respect to the effect which the fact might have upon the rights of the surety, whether the usurious contract was

First National Bank of Charlotte v. Lineberger.

executed or executory, said: "The contract for usury is equally void whether the money is actually paid or only promised to be paid. I think it is impossible to maintain that either the promise or the payment of usury is a good consideration at all."

According to the finding of the jury in our case upon the first issue, the agreement for the indulgence was void. The act of 1876-77, ch. 91, § 3, declares "that the taking, receiving, reserving or charging a rate of interest greater than is allowed in the preceding section (six or eight per cent) when knowingly done shall be deemed a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon; and in case a greater rate of interest has been paid, the person by whom it has been paid or his legal representative may recover back by an action in the nature of an action for debt twice the amount of the interest paid."

The purpose and effect of this statute were not only to make void all agreements for usurious interest, but to give a right of action to recover back double the amount after it has been paid. The contract then in our case to pay the one and a half per cent per month for the indulgence was void. If agreed to be paid in the future the promise was void, and none of the sum so promised to be paid could be collected by action. And if paid down, double the amount paid could be recovered back. So the agreement taken either way had no legal binding force upon the makers, and therefore, according to the authorities cited, the indorser was not discharged. There is no error, and the judgment of the Superior Court must be affirmed.

No error.

Judgment affirmed.

NOTE BY THE REPORTER.—That a surety is discharged by an agreement of indulgence by the creditor to the principal debtor, founded upon a usurious consideration paid in advance, is held in *Stillwell v. Aaron*, 69 Mo. 536; s. c., 33 Am. Rep. 517; *Hamilton v. Prouty*, Wisconsin Supreme Court, Dec. 1880. In the latter case it is put on the ground that the defense of usury is personal to the debtor, and the court said:

"The debtor may plead usury or not at his pleasure, and unless and until he does so, the note which was given for the usury is valid, and a part of it has already been paid in goods. The contract was sufficient to prevent the sureties from paying the debt and suing the principal: and that is the wrong of which they have the right to complain." If then the creditor's hands were tied by receiving the usurious premiums until after the period of the extension had expired, there would seem to be no escape from the conclusion that the indorsers were thereby discharged. *Myers v. Bank*, 78 Ill. 257; *Wittmer v. Elison*, 72 id. 301; *Austin v. Darwin*, 21 Vt. 38; *Turrell v. Boynton*, 21 id. 142; *Bank v. Woodward*, 5 N. H. 99; *Cox v. Ry.*, 44 Ala. 611; *Kensingham v. Bedford*, 1 B. Monr. 385; *Armistead v. Ward*, 3 Patt. & H. 504." See *Berry v. Pullen*, 60 Me. 101; s. c., 31 Am. Rep. 248.

STATE V. JONES.

(83 N. C. 605.)

Criminal law — woman abetting attempt at rape.

A woman, aiding and abetting an attempt to commit a rape is guilty as a principal.

CONVICTION of assault with intent to commit rape. The opinion states the case.

Attorney-General, for State.

DILLARD, J. The indictment contains two counts, one charging John Jackson with an assault with intent to commit a rape on one Sarah Jane Waldriss; and defendant Love Ann Jones with being present aiding, abetting and assisting; and the other charging in joint terms a simple assault and battery. At the trial of Love Ann Jones (the male defendant not being taken), the jury found her guilty of the assault with intent to commit rape in manner and form as charged in the bill of indictment, and from the refusal of the court to arrest judgment this appeal is taken.

The question presented in this case for review is, whether a woman, being incapable in and of herself to commit rape, can be convicted and punished on a bill charging a man with an assault with intent to commit a rape, and charging herself with being present, aiding, abetting and assisting. At common law, rape was a felony, and the rule was, that all persons who were present aiding, abetting and assisting a man to commit the offense, whether men or women, were principal offenders and might be indicted as such, or if not present in a legal sense, they might be guilty as accessories before or after the fact. 1 Russ. on Crimes, 557; 1 Hale P. C. 628; 1 Hawk. P. C., ch. 16, § 10. And by these authorities it is clear, that if the offense had been rape, instead of an assault with intent to commit rape, the presence of the female defendant aiding and assisting John Jackson in the deed would have made her guilty, and the grade of her guilt would have been that of a principal, or if not present but yet aiding, encouraging and assisting in the crime, her guilt would have been that of an acces-

State v. Holland.

sory before the fact. But the offense charged in the bill of indictment in this case is a mere misdemeanor, as decided by this court in *State v. Perkins*, 82 N. C. 681, and being such, Love Ann Jones, if guilty at all, incurred the guilt of a principal, the rule being that whatever would make a person principal in the second degree or accessory before the fact in a felony, makes him or her a principal in misdemeanors. 1 Whart. Cr. Law, § 2709. Applying this rule to the case at bar, John Jackson by the assault with the intent to commit the rape was a principal; and so likewise the female defendant (although incapable in and of herself to commit the offense), by advising, procuring or assisting in its perpetration, incurred guilt and of the grade of a principal, and is responsible as such, whether present or absent at the time of the fact committed.

[Omitting a minor consideration.]

There is no error and this will be certified to the criminal court of New Hanover.

Decree accordingly.

PER CURIAM. No error.

STATE V. HOLLAND.

(88 N. C. 684.)

Criminal law — unsupported evidence of accomplices.

A conviction may be supported upon the uncorroborated testimony of an accomplice.*

CONVICTION of larceny. The conviction was on the uncorroborated testimony of an accomplice.

Attorney-General, for State.

John Manning, for defendant.

ASHE, J. We know that in England a defendant cannot be convicted upon the uncorroborated testimony of an accomplice. His testimony is allowed to go to the jury to be weighed by them for what it is worth, when supported by other evidence or by circum-

* To same effect *Com. v. Holmes* (127 Mass. 484), 84 Am. Rep. 381.

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stances confirmatory of his testimony. But in this State a different doctrine obtains. Here, a defendant may be convicted upon the unsupported testimony of an accomplice.

In the case of *State v. Haney*, 2 Dev. & Bat. 390, this court held that "the unsupported testimony of an accomplice, if it produces entire belief of the prisoner's guilt, is sufficient to warrant a conviction; and the usual direction to the jury not to convict upon it, unless supported by other testimony, is only a precautionary measure to prevent improper confidence being reposed in it, and the propriety of giving this caution must be left to the discretion of the judge who tries the cause." The same doctrine is announced in the case of *State v. Hardin*, id. 407, where Chief Justice RUFFIN says: "It is however dangerous to act exclusively on such evidence, and therefore the court may properly caution the jury, and point out the grounds for requiring evidence confirmatory of some substantial part of it. But the court can do nothing more, and if the jury yield faith to it, it is not only legal but obligatory on their consciences to found their verdict upon it."

There is no error. Let this be certified to the Superior Court of Chatham county, that further proceedings may be had in conformity to this opinion and the law.

No error.

Per CURIAM.

CASES
IN THE
SUPREME COURT
OF
OHIO.

ENTERPRISE INSURANCE COMPANY V. PARISOT.

(25 Ohio St. 35.)

Insurance — marine — carelessness of insured.

A marine insurance is not defeated by the mere fact the loss might have been avoided by the exercise of proper care on the part of those in charge of the vessel at the time.

ACTION on a policy of insurance of a vessel lying up, in a river, against perils "of the seas, lakes, rivers, canals, fires, and jettisons," etc. The policy also contained this condition : "And the assured also agrees that the steamboat aforesaid is, and shall be, at all times during the continuance of this policy, tight and sound, and her seams properly caulked, and sufficiently found in tackle and appurtenances thereto, and completely provided with master, officers and crew, and in all other things and means necessary for the safe navigation thereof." The plaintiff had judgment below.

John F. Follett and *W. C. Cochran*, for plaintiff in error. Negligence *per se* is not a peril insured against. 3 Kent, 300 ; Arnold on Insurance (4th London ed.), part 3, ch. 1, 664, 667-669, 691;

Tanner v. Bennett, Ry. & M. 182; 1 Pars. on Marine Ins. 380, 381, 549, 534; 1 Phill. on Ins., §§ 1049, 1057; Marsh. on Ins. 376; *Insurance Co. v. Sherwood*, 14 How. 352, and cases there cited; *Lodwicks v. Ins. Co.*, 5 Ohio, 433, 486; *Howell v. Ins. Co.*, 7 Ohio (part 1), 276; *Fulton v. Ins. Co.*, 7 Ohio (part 2), 27; *Perrin v. Ins. Co.*, 11 Ohio, 147; *Ins. Co. v. Lawrence*, 10 Pet. 517; *Waters v. Ins. Co.*, 11 id. 213.

Paxton & Warrington, for defendant in error.

GILMORE, C. J. There are two objections urged against the charge of the court. The first is as to the proofs of loss, and the alleged waiver thereof by the insurer; and the second is as to mere negligence of the watchman and those having charge of the boat, being a peril insured against.

[Omitting the first.]

2. In the second place it is claimed that the court erred in charging that mere negligence of the watchman and those having care of the boat was a peril insured against.

The clause in the charge that is complained of is this: "If she was in such seaworthy condition, and sufficiently manned for such a boat so lying up, and the loss was occasioned by the mere negligence and want of proper care of her watchman and those having the care of her, the plaintiff will be entitled to recover, if he has proved all other necessary facts, for such negligence is a peril insured against."

The court had previously charged that where a boat sinks without any known cause the law presumes that such sinking is caused by unseaworthiness of the boat, and that if the loss arose from ordinary wear and tear, or from unseaworthiness, or from encountering an ordinary peril of the river, the plaintiff could not recover, for as to these he was his own insurer; that the burden was on the plaintiff to prove by a preponderance of evidence that the boat was seaworthy within the requirements for such boats; that she was tight and sound and her seams properly caulked, and sufficiently found in tackle and appurtenances thereto, and completely manned and duly provided in all things and means necessary for the safety of the vessel, and that such a state of things had to be maintained by the plaintiff during the continuance of the risk. Then comes the clause above quoted, which was immediately followed by this language:

Enterprise Insurance Company v. Parisot.

"But if the negligence consisted in allowing the boat to become unseaworthy, and she was lost thereby, there can be no recovery.

"The boat need not have been sufficiently seaworthy to perform a voyage, but it must have been for her preservation under all ordinary circumstances while tied up during such period of non-user, and if she encountered a peril insured against which she would have safely resisted if seaworthy, but in consequence of being unseaworthy was sunk by encountering a peril insured against, then the plaintiff cannot recover.

"And further, if the boat was unseaworthy when laid up, but thereafter her seams were suffered to become open by exposure, which the plaintiff failed to have properly caulked, and she was not in a safe and seaworthy condition requisite for her safety when tied up, then the plaintiff cannot recover.

"The boat must have been kept in such condition as to be reasonably sufficient to withstand the ordinary perils attending a boat so laid up at that time and place. If she was not so kept the plaintiff cannot recover, no matter what peril she may have encountered. If she was, and encountered wind or waves, by which she broke her spars, was driven against the bank and careened so as to be thrown on her side so as to take in water at her seams, which were far enough above the water-line so as not to endanger her safety while lying up under ordinary circumstances, and sunk in consequence thereof, then the plaintiff can recover if he had provided and kept at the boat a force of men sufficient to take care of the boat under ordinary perils, whether all such men were directly in his employ and pay or not."

The clause in the charge that is complained of lays down the law correctly on that point, and when taken in connection with the other parts of the charge could not have misled the jury. If all the "other material facts" required by the charge — all of which were controverted — had been proved by a preponderance of testimony, and the boat was lost by reason of encountering a storm of wind, the plaintiff was entitled to recover, notwithstanding, as was proved, one of the watchmen was asleep and the other was on a neighboring boat at the time the storm occurred, and their negligence in this respect may have occasioned the loss.

"In an action on a policy of insurance it is no defense to show that the loss was occasioned by negligence in the agents of the assured." *Perrin's Adm'r v. Protection Insurance Co.*, 11 Ohio, 146.

In *Busk v. Royal Exchange Assurance Co.*, 2 B. & Ald. 73, the question for the opinion of the court was whether the defendants were exempted from their liability for the loss on the ground of its having been occasioned by the negligence of the mate. The act committed by the mate was lighting a fire in the cabin, and in the evening leaving the ship, going on board of another lying contiguous, and remaining there all night.

In this case it was held that where the assured had once provided a sufficient crew, the negligent absence of all the crew at the time of the loss was no breach of the implied warranty that the ship should be properly manned.

This doctrine is followed and approved in *Walker v. Maitland*, 5 B. & Ald. 171.

In this case the mate in charge of the vessel went to sleep, leaving the charge of the watch to one of the seamen, another having the helm, and soon after the mate went to sleep the whole of the watch on duty went to sleep. The vessel, being left to the mercy of the waves, ran ashore and was beaten to pieces.

In the case of *Henderson v. Western Marine and Fire Insurance Co.*, 10 Rob. (La.) 164, it was held that the underwriters are answerable for any loss occasioned by the negligence of those in charge of the property insured.

These authorities fully sustain the clause in the charge here complained of. It was, in effect, saying that where a vessel is lost by one of the perils insured against the insurer will be liable, although the loss might have been avoided by the exercise of proper care of those in charge of the vessel at the time of the loss.

[Omitting a minor matter.]

Judgment affirmed.

HILTABIDDLE V. STATE.

(38 Ohio St. 52.)

Criminal law — rape — capacity — infant under fourteen.

On the trial of an indictment for rape, against a boy under fourteen years of age, the burden is on the State to prove his capacity to commit rape, and a statute dispensing with proof of emission does not change the rule

Hiltabiddle v. State.

CONVICTION of rape. The court charged the jury, among other things, as follows: "To constitute carnal knowledge, there must be both penetration and emission. Both of these elements are necessary in the crime of rape. I am requested to instruct you, that if you find from the evidence, that the defendant was under the age of fourteen years at the time of the alleged rape, it is a presumption of law that he is incapable of committing the crime. This is true, and this presumption arises from human experience, and the result ascertained, that an infant under that age is ordinarily incapable of committing this crime; that the sexual organs of the male are ordinarily not sufficiently developed at that age to accomplish penetration and emission of seminal fluid. But this presumption becomes weaker and weaker as the male approaches the age of fourteen years, and as soon as he arrives at that age, the presumption changes, and the probability and the presumption then is, that such male is capable of committing the crime, and has arrived at the condition of puberty. * * * I say to you, as matter of law, that if you find the defendant, incited by sexual desire thereto, had sexual connection with the prosecuting witness, forcibly and against her will; that at the time he was of the age of fourteen years, less three months and two days only; that the sexual organs of the defendant were then so developed that in and by such sexual intercourse he accomplished the rupture of the hymen of the prosecuting witness by penetration; and that there was then and there sexual emission on his part — at or about the time stated in the indictment — this is sufficient to constitute the offense, and in that case you should find the defendant guilty, unless the defense satisfies you that the fluid there emitted was not germinal and did not contain seed."

S. E. Fink and D. Dirlam, for plaintiff in error.

Isaiah Pillars, attorney-general, and *John C. Burns*, prosecuting attorney, for State.

OKEY, J. Sir Matthew Hale truly observes that "rape is a most detestable crime." Where the injured party is a child, the outrage is most revolting. The mind is led, unconsciously, to the consideration of what the punishment ought to be, rather than to the inquiry which it is our duty to make. But our duty is simply to ascertain whether the plaintiff in error has been legally convicted

of the felony of rape. Until 1815, that crime was punishable in this State with death; and, although the penalty is at present less than death, we must observe the same rules as formally in ascertaining whether the crime has been committed.

Whatever doubt existed on the question, it was settled in *Blackburn v. State*, 22 Ohio St. 102, that *emissio seminis* is an essential ingredient in the crime of rape. In consequence of that decision, the legislature in 1874 passed a statute on the subject. 71 Ohio L. 14. In 1877, that act was incorporated into the Code of Criminal Procedure, in the following form: "Carnal knowledge or sexual intercourse shall be deemed complete upon proof of penetration only." 74 Ohio L. 349, § 31.

Similar provision had been made in England more than half a century previous to that time (9 Geo. 4, ch. 31; 24 and 25 Vict., ch. 100), and the same thing had been done in New York, Michigan, Iowa, Arkansas, and doubtless in other States. These statutes, it had been perfectly well settled, did not increase the class of persons who might be convicted of rape, but simply made penetration conclusive evidence of emission. *R. v. Groombridge*, 7 C. & P. 582; *R. v. Philips*, 8 id. 736; *R. v. Jordan*, *R. v. Brimlow*, 9 id. 118, 366; *R. v. Read*, 1 Den. 377; 3 Greenl. Ev., §§ 210, 215. Moreover, the provision should be strictly construed in favor of one accused of crime, and hence, the fair construction is, that it does not enlarge the meaning of the statute defining the crime of rape (74 Ohio L. 245, § 9), so as to extend it to one having no capacity to emit semen.

In England, a boy under fourteen years of age cannot, in contemplation of law, be guilty of the crime of rape, or of an assault with intent to commit it. It may not be entirely clear why the presumption in a case of this character — unlike that which pertains to crimes, in general, committed by persons under that age — should be conclusive; but such is the fact. In *Williams v. State*, 14 Ohio, 222, it was held the presumption exists here, but that it may be rebutted. The ground of the decision is, that by reason of difference in climate, and other causes, puberty is arrived at earlier here than in England. "In our State," said READ, J., "we know that many infants under fourteen are capable of being guilty, but that a majority are not capable under that age." Undoubtedly the common law is only in force in this State so far as its principles are adapted to our condition; and it is also true, that the age at which

puberty is reached is dependent not only on race and the habits of the people, but also on climate. In England as well as in Ohio, males, in many cases, arrive at puberty before they attain the age of fourteen years, as will appear from the cases already cited. If a range of mountains occupied the place of our great northern lakes and their connecting rivers, we might have the semi-tropical climate of the same latitude in Spain, Portugal and Italy, in which puberty is attained by boys, in nearly all cases, before they arrive at the age of fourteen years; but our climate is very different; and in my opinion, there is no appreciable difference in the age at which a boy in Ohio and one in the higher latitude of England undergoes the change in question. Still the rule that the presumption of incapacity may be rebutted, as determined in *Williams' case*, has stood as the law of this State for many years, and we are not willing to disturb it. But here we are asked, not only to adhere to *Williams v. State*, but to go a step further, and on evidence of the most unsatisfactory character, cast on the accused the burden of proof of his incapacity. The answer to this claim is found in the principle asserted in *Williams v. Roberts*, 5 Ohio, 35-44, where it was said that, while the court may feel bound by the authority of a former decision, it may be unwilling to extend it. And see 14 Ohio, 236; 11 Ohio St. 289.

The rule laid down in *Williams v. State* has not been generally followed elsewhere, but it was substantially approved in one case in New York (*People v. Randolph*, 2 Park. 174), where the facts were quite similar. In reversing the conviction the court said — what seems quite pertinent here — that “the prisoner was proved to have been of age when the law presumes him to be incapable of committing the crime, and it was the duty of the prosecution not only to meet, but to repel, this presumption by clear proof of his capacity.”

Recurring to the case presented in the record, it is quite clear that the learned judge in the court below overlooked the statute dispensing with the proof of omission. This is not strange, in view of the confused condition of our statute law, from which, I hope, we are about to have relief. This oversight does not of itself call for a reversal although in consequence of it, the attention of the jury was directed rather to the capacity of the accused, as exhibited in the actual occurrence, than to his capacity in point of fact. But the vice in the charge is the statement that penetration, rup-

ture of the hymen, and the discharge of any sort of "sexual fluid," would cast on the accused the burden of proof, to show that such fluid was not seminal. The proof of penetration and rupture of the hymen was not *prima facie* evidence, as it would have been in case of a boy over fourteen years of age, that the accused had arrived at puberty. The direct proof of emission was slight. But however cogent the evidence may have been, it was for the jury. In some cases it is proper to say to a jury what their verdict must be, if they find particular facts to be proved (as in *Walker v. Stetson*, 14 Ohio St. 89); but on an issue like that involved in this case, a court is not authorized to enumerate facts of no determinate value, and say that if they are proved, a *prima facie* case for conviction is made. *State v. Learnard*, 41 Vt. 585; *Railroad Co. v. Lawrence*, 13 Ohio St. 66.

We are satisfied the proper course in this case was to have said to the jury, in substance, that if they found the accused had sexual intercourse with the child in the manner stated in the indictment, but that he was, at the time, under fourteen years of age, the burden was on the State to show that he was capable of emitting semen; and that the weight which should be given to the evidence, tending to prove or disprove such capacity, was for the consideration of the jury.

Of course, if an assault was proved, but not the rape, the prisoner might have been convicted of the assault.

For error in the particular stated, the judgment must be reversed, and the cause remanded for a new trial.

Judgment reversed.

BOYNTON, J., dissented.

STATE V. HARPER.

(25 Ohio St. 78.)

Criminal law — evidence — dying declarations of victim of abortion.

Dying declarations are admissible in evidence only when the death of the declarant is the subject of the charge, and the circumstances of the death are the subject of the declarations. So, upon an indictment for a fatal attempt to produce abortion, the dying declarations of the victim are inadmissible.

State v. Harper.

INDICTMENT for attempt to procure abortion on R. G. The prosecution offered to prove that while the said R. G. was *in extremis*, she told the witness that the defendant had used an instrument in and upon her person and womb, for the purpose of producing an abortion, in consequence of which she had a miscarriage a few hours before, and her sickness was wholly caused thereby. This was excluded and defendant was acquitted.

E. A. Ballard, for plaintiff in error.

Isaiah Pillars, for defendant in error, cited 1 Whart. Crim. Law (7th ed.), § 675, and authorities there cited; 1 Greenl. on Ev., § 156; 3 id., § 236; 1 Taylor on Ev. 644-646; 2 Russ. on Crime, 761; *Rex v. Lloyd*, 4 C. & P. 233; *Rex v. Hutchison*, 2 B. & C. 608; *Brown v. Commonwealth*, 73 Penn. St. 321; s. c., 13 Am. Rep. 740; *Lambeth v. Mississippi*, 23 Miss. 322; *People v. Davis*, 56 N. Y. 96; *Wilson v. Boerem*, 15 Johns. 286; *Rex v. Edwards*, 4 Eng. 519 (Moak).

GILMORE, C. J. This was an indictment for unlawfully using an instrument with the intent of producing an abortion, and not an indictment for homicide. *State v. Barrier*, 28 Ohio St. 583; *People v. Davis*, 56 N. Y. 95.

The death of R. G. was not the subject of the charge, and the death was alleged only as a consequence of the illegal act charged, which latter was the only subject of investigation.

Did the court err in rejecting the dying declaration of R. G. in proof of the charge?

We think not. The general rule is that dying declarations are admissible only when the death of the declarant is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. *Rex v. Mead*, 2 B. & C. 605; 1 Greenl. Ev., § 156; *Rex v. Lloyd*, 4 C. & P. 233; *Runyan v. Price*, 15 Ohio St. 8.

Upon an indictment for feloniously using an instrument upon the person of a woman, who afterward died, with intent to procure an abortion, the dying declarations are inadmissible. *Reg. v. Hind*, 8 Cox C. C. 300; 56 N. Y., *supra*.

Exceptions overruled.

KIRCHNER V. MYERS.

(86 Ohio St. 88.)

Civil Damage Act — evidence — injury to means of support — death.

In an action under the Civil Damage Act, to recover damages to means of support by reason of intoxication caused by liquors sold continuously, during a period of three years, to a person in the habit of getting intoxicated, the defendant may offer evidence to show that, during the same period, such person became intoxicated by liquors which he purchased of other persons. In such action, damages resulting from the death cannot be recovered of such person by such intoxication. (*See note, p. 601.*)

ACTION under Civil Damage Act. The opinion states the facts. The plaintiff had judgment below.

W. L. Walker and Kernan & Kernan, for plaintiffs in error.

John D. King and W. & J. H. Lawrence, for defendant in error.

OKEY, J. 1. The charge in the petition is that the defendants below had, in Kenton, during three years next preceding November 15, 1873, continuously sold to Frederick Myers intoxicating liquors, thereby causing him frequently to become intoxicated, whereby the plaintiff below was injured in her means of support. The defendants offered evidence tending to prove, that during a portion of that time, Myers had repeatedly purchased liquor of other persons in Kenton, and became intoxicated thereon. They also offered the written admissions of the plaintiff below, tending to prove the same fact. But the court excluded the evidence, both oral and written, and in this, we think, erred.

Under the act of 1854, as amended in 1870 (67 Ohio L. 103), which governed this case, it was provided that the injured party should "have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by giving or selling intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons." No doubt, under this act, if two sellers, though wholly independent of each other, contributed, by their unlawful sales, to the same intoxication, whether of long or short duration, a wife injured thereby in her means of support

Kirchner v. Myers.

could recover damages for the whole injury, in a joint action against them; and she might recover against either or both of them, in a separate action or actions, the same amount of damages, though she could have but one satisfaction. But this did not render a party liable for the independent, unlawful act of another seller, having no such connection with any unlawful sale he may have made.

Evidence having been given tending to prove that for three years immediately preceding November 15, 1873, the defendants continually sold to Myers intoxicating liquors, upon which he frequently became intoxicated, the jury might readily infer that the defendants caused all the injury which the plaintiff below sustained by reason of the intoxication of her husband. Surely, to rebut such inference, the defendants should have been permitted to offer evidence, that during the same time, Myers purchased liquor and became intoxicated at other saloons in Kenton. It would have been for the jury to say, whether the sales at other saloons had simply contributed to or increased the intoxication produced by liquors sold by the defendants below, in which case the evidence could not have aided them; or whether, in fact, the liquors procured of persons other than the defendants caused independent intoxications, to which the defendants below did not contribute, in which case the evidence should have been considered in their favor, and have had such weight as the jury might think, under the circumstances, it was entitled to receive. And the admissibility of such evidence is more apparent when it is remembered that the statute places this action on the ground of a suit in tort involving fraud or malice, as to the right of the jury to include in their verdict exemplary damages; for the amount of such damages can only be properly determined on the fullest consideration of the real cause or causes of the injury, with the attending circumstances. See *Engleken v. Webber*, 47 Iowa, 558.

Miller v. Patterson, 31 Ohio St. 419, in no way militates against, but supports this conclusion. There separate actions had been brought by the same person against different defendants, the petitions being, in form, identical; and it was held, "the fact that the plaintiff in one case received a sum of money in satisfaction and discharge of her cause of action was no defense in the other case, if in fact the intoxications were separate and distinct."

2. We are of opinion, furthermore, that the court erred in failing

to charge the jury, and in the charge given, as to the effect of the death of Myers on the amount of recovery. The case was tried before *Davis v. Justice*, 31 Ohio St. 359; s. c., 27 Am. Rep. 514, was decided, and hence, in view of the difficult question presented, it is not strange that court and counsel fell into error. It was held in *Davis v. Justice*, that in an action under the above mentioned act of 1870, for injury to means of support in consequence of intoxication which caused the death of the intoxicated person, damages resulting from the death cannot be recovered. True, the request made in this case did not contain a correct statement of the law, and the court properly refused to charge as requested. It is also true that the failure to charge a correct proposition of law, pertinent to the case, will not ordinarily afford ground of reversal, if there was no request to charge such proposition. But here the attention of the court was directed by counsel to the effect of death on the amount of the recovery, and the response was, not merely a refusal to charge as requested, but a statement to the jury that if the plaintiff was entitled to a verdict, "the amount must fully compensate her for all she has lost in her means of support, both present and future;" and no other allusion was made to the effect of death on the amount of the recovery. The jury were authorized, under such a charge, to take into consideration support he might have rendered if death had not resulted in the way stated, which, as we have seen, is opposed to *Davis v. Justice*; and hence the charge was not merely misleading, but under the circumstances, erroneous.

As already stated, the question involved in *Davis v. Justice* was not free from difficulty. Cases may be found in seeming opposition to that decision. *Rafferty v. Buckman*, 46 Iowa, 195; *Jackson v. Brookins*, 5 Hun, 530; *Quain v. Russell*, 8 id. 319; *Schroeder v. Crawford*, 94 Ill. 357; s. c., 34 Am. Rep. 236. On the other hand, it is not without support. *Krach v. Heilman*, 53 Ind. 517; *Collier v. Early*, 54 id. 559; *Backes v. Dant*, 55 id. 181; *Shugart v. Egan*, 83 Ill. 56; s. c., 25 Am. Rep. 359; *Brookmire v. Monaghan*, 15 Hun, 16, following *Hayes v. Phelan*, 4 id. 733; 5 id. 335. But independently of such support, we are satisfied with *Davis v. Justice* for the reasons stated in the opinion of McILVAINE, J., concurred in by a majority of the court; and we adhere to that decision.

In the case of *Davis v. Justice*, it appeared that the plaintiff's husband was run over by a train of cars while intoxicated, and

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instantly killed. In this case, the evidence tended to show that the intoxication led to exposure, which, together with the enfeebled condition of the system caused by intemperance, induced pneumonia, which occasioned death. To such a case, and perhaps indeed to *Davis v. Justice*, the principal reason given for the judgment in *Krach v. Heilman, supra*, where the facts were analogous in this respect to the case under consideration, would also seem to be applicable. There the right to recover, which was based on a statute in terms like our act of 1870, was denied by the application of the maxim, *causa proxima non remota spectatur*. To the same effect is *Shugart v. Egan, supra*.

Judgment reversed, and cause remanded for a new trial.

BOYNTON, J., dissented from the second proposition.

NOTE BY THE REPORTER. — See *contra, Roosa v. Perkins*, 9 Neb. 304; s. c., 31 Am. Rep. 409. In *Barrett v. Dolan*, Massachusetts Supreme Court, January, 1881, it was held that as in that Commonwealth there is no right of action by any person for damages occasioned by the death of another, so the statute providing for a recovery by the husband, wife, child, parent, guardian, employer or other person who shall be injured, of damages for injuries caused by the use of intoxicating liquors, cannot be considered to give the right by implication to recover for the death of a party through said cause.

FIREMAN'S INSURANCE COMPANY OF DAYTON V. HOLT.

(35 Ohio St. 189.)

Insurance — condition against subsequent — subsequent voidable insurance.

A condition in a fire policy against subsequent insurance is not broken by the taking of a subsequent policy valid on its face, but voidable for breach of condition, although such subsequent policy was paid.*

ACTION on a fire policy by Holt, receiver of the Washington Woolen Mills Company. The policy was conditioned to be void in case of subsequent insurance not notified and indorsed. The defense was breach of this condition. After the destruction of the property the companies that had issued the subsequent policies compromised with the insured, and paid a part of the amounts insured by them respectively, which was accepted in satisfaction of

* *Contra, Allen v. Merchants' Mut. Ins. Co.* (30 La. Ann. 1386), 31 Am. Rep. 343.

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the whole. The plaintiff had judgment below. The opinion states other facts.

R. & E. T. Waite, for plaintiff in error.

Osborn & Swayne, for defendant in error.

GILMORE, C. J. If the subsequent policies taken out by the insured constitute breaches of the condition against further insurance contained in the policy sued on, the District Court erred in reversing the judgment of the Common Pleas, if not, there is no error.

The insurer held the affirmative of the issue made by the pleadings on this point, and as it was insisting that the insured had forfeited all rights under its policy by the breach of a condition inserted therein for its own benefit, it was bound to strictly prove that the condition had been broken. The evidence upon which it relied for this purpose consisted of the several subsequent policies procured from other companies by the insured on the same property, without the knowledge or consent of the defendant below.

By conditions contained therein each of these subsequent policies requires that, "if the interest in the property be other than the entire, unconditional and sole ownership of the property for the use and benefit of the insured, it must be so represented to the company, and expressed in the written part of the policy, otherwise the policy shall be void." The bill of exceptions shows that prior to the issuing of the subsequent policies the insured conveyed the property covered by all the policies by a deed absolute on its face to one Amos Babcock. In each of the subsequent policies the insured is described in the written part thereof as the owner of the property without qualification. The record does not show that the insurers issuing the subsequent policies had any notice or intimation that this description of ownership was false. Under these circumstances, as between the parties to them, neither of these subsequent policies ever took effect; they were void *ab initio*. *Mutual Assurance Society v. Holt*, 29 Grat. 612.

Counsel for plaintiff in error admit that this may be true as regards a policy void upon the face of it, and possibly as to one that has been actually and legally avoided, but claim that it is not true as regards one that has not been avoided, and can only be

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after a reference to extrinsic facts. They ask: Who is to determine whether such a policy can be avoided or not? The answer is, that if a policy is voidable on its face at the election of the party issuing it, such party alone can elect to avoid it, and until the election is made the policy would be regarded as obligatory upon the parties to it; and the same rule would apply if the fact that the policy was voidable was made to appear by admissible extrinsic facts. But the doctrine applicable to voidable policies has no place here. Each of the subsequent policies in question is valid upon its face; and *prima facie* binding on the parties to it. And by the terms of the condition upon which its character in this respect depends it must be either valid or void as between the parties, and it can occupy no middle ground.

Having already said that the subsequent policies never took effect between the parties, by reason of the breach of the conditions therein contained, we hold that the condition against further insurance in the policy sued on was not broken by such subsequent policies. The condition contemplates subsequent valid insurance, and is not broken by an attempt to obtain further insurance, which was in legal effect all that was done by the insured in this case.

But notwithstanding this is so, counsel for plaintiff in error further claim that the compromise and settlement made by the Woolen Mills Company with the companies making the subsequent insurance estops the plaintiff below from setting up or claiming, as against the defendant below, that the subsequent insurance is void, and did not constitute such other insurance as entitled the defendant to notice thereof. There are authorities which are entitled to very great respect, that sustain this view. *Carpenter v. Providence Ins. Co.*, 16 Pet. 495; *Bigler v. N. Y. Cent. Ins. Co.*, 22 N. Y. 402; *Jacobs v. Eq. Ins. Co.*, 19 Up. Can. 250.

But supported as it is by these authorities, we cannot sanction the doctrine contended for. In the absence of fraud, which is not claimed, there are no facts shown upon which to found an estoppel. The attempt to obtain further insurance did not of itself prejudice the insurer. If it be said that the belief that it had obtained further insurance was calculated to make the agents of the company and owners of the property less anxious for its preservation, or less watchful in protecting it, and that this increased the insurer's risk, and was bad faith toward, and prejudicial to, the insurer, the answer is, that none of these things can be presumed, and there is no evi-

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dence tending to prove them. There is no principle upon which the compromise and settlement by the parties of the subsequent void policies can work an estoppel.

The fact that the subsequent insurers may have regarded their policies as valid or avoidable did not make them so; and the fact that the insured received a part or the whole of the amount insured by them, did not prejudice the defendant below nor estop the insured from proving that the subsequent policies were void. The rights of the parties, under the policy sued on, became fixed at the time the loss occurred, and could not be affected by what was subsequently done between the insured and third parties.

We hold therefore that the receipt of payment on the subsequent void policies is not matter of defense to an action on a prior policy.

This view is sustained by the weight of authority in this country. See *Stacey v. Franklin Ins. Co.*, 2 W. & S. 506; *Jackson v. Massachusetts Mut. Ins. Co.*, 23 Pick. 418; *Philbrook v. New England Ins. Co.*, 37 Me. 137; *Lindley v. Union Mut. Ins. Co.*, 65 id. 368; s. c., 20 Am. Rep. 701; *Gale v. Belknap Ins. Co.*, 41 N. H. 170; *Gee v. Cheshire Co. Mut. Fire Ins. Co.*, 55 id. 65; s. c., 20 Am. Rep. 171; *Schenck v. Mercer Co. Ins. Co.*, 4 Zab. 447; *Thomas v. Builders' M. F. Ins. Co.*, 119 Mass. 121; s. c., 20 Am. Rep. 317; *Sutherland v. Old Dominion Ins. Co.*, 31 Gratt. 176; *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325; s. c., 11 Am. Rep. 125; 29 Gratt. 612, *supra*; *Knight v. Eureka Ins. Co.*, 26 Ohio St. 664; s. c., 20 Am. Rep. 778.

Finding no errors on the record, the judgment of the District Court is affirmed.

Judgment affirmed.

DYE V. SCOTT.

(35 Ohio St. 194.)

Negotiable instrument — evidence — of waiver of demand and notice.

As between indorser and his immediate indorsee, oral evidence is competent to prove waiver of demand and notice of non-payment at the time of indorsing in blank.*

Waiver of demand waives notice of non-payment.†

* To same effect, *Taylor v. French* (2 Lea. 257), 21 Am. Rep. 698.

† Compare *Harvey v. Nelson* (31 La. Ann. 434), 23 Am. Rep. 282.

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ACTION on a promissory note. The opinion states the case. The plaintiff had judgment at trial, which was reversed by the District Court.

Ewart, Sibley & Ewart, for plaintiff in error.

John A. Hamilton, for defendant in error.

GILMORE, C. J. The questions presented on the record are:

1. Is oral testimony admissible to prove that the indorser, as between himself and the indorsee, at the time of indorsing a note in blank, waived the usual demand and notice?

2. Did the Court of Common Pleas err in ruling the motion to arrest the case from the jury, and render judgment for the defendant?

3. Did that court err in refusing to charge as requested, or in the charges given?

1. Did that court err in overruling the motion for a new trial?

First. From the indorsement in blank of a note not due, the law presumes that the indorser thereby intends to bind himself to pay the note, on the condition that he has due notice of its dishonor at maturity.

The question presents itself, whether the indorsement is conclusive, or only *prima facie* evidence of the contract which the law presumes to arise therefrom.

There are authorities which hold that the contract which the law implies or presumes, in such cases, is as conclusive and certain as if written out in full, and that parol evidence is not admissible to vary or contradict it. The reason given for requiring such strictness, in substance, is that the indorsement adds to the value of the instrument by giving it currency in commercial transactions; and that its value would be impaired, and circulation restricted, by admitting oral testimony to vary or contradict the terms of the contract which the law presumes or implies from the indorsement, even as between indorser and indorsee. See *Bank of United States v. Dunn*, 6 Pet. 51; *Dale v. Gear*, 38 Conn. 15; *Bernard v. Gaslin*, 23 Minn. 192; *Barilett v. Lee*, 33 Ga. 491.

While we sanction the doctrine that upholds the credit and negotiability of commercial paper in the hands of any *bona fide* holder for value, we do not, in order to accomplish this, see the necessity

of carrying the doctrine quite so far as it is carried in the cases above cited.

As between the indorser and indorsee, we regard the blank indorsement as only *prima facie* evidence of the contract which the law presumes to arise therefrom. If the indorsement is made upon no other, that contract will control the rights of the parties. If there was a contemporaneous contract between the parties, upon which the indorsement was made, both reason and justice require that as between themselves, the actual and not the presumed contract should be enforced; and as between them, oral testimony should be admissible to prove the contemporaneous contract. This will not necessarily, or even probably, impair the currency or credit of the instrument as commercial paper. Prior parties to it will not be affected, nor will the rights of subsequent indorsees without notice be impaired or limited in any degree. As to all the world, except the parties to the special contract, and as between themselves only, the character of the instrument as commercial paper will remain unaffected.

The only purpose for which oral testimony was introduced on the trial was to prove that the indorser, as between himself and his immediate indorsee, waived the usual demand and notice at the maturity of the note; and it is unnecessary for us to go further in this case than to hold, as we do, that oral testimony was admissible for that purpose. This holding is fully sustained by authorities.

In Daniels on Negotiable Instruments, § 1093, it is said: "It is conceded on all sides that a verbal waiver is as effectual as a written one; and the weight of authority sustains the proposition that a parol promise to pay the note absolutely, made by the indorser at the time he indorses it, or a promise to pay it if the maker does not, or a verbal agreement between the parties that payment should not be demanded until after maturity, is admissible to prove a waiver of demand and notice."

In 1 Parsons on Notes and Bills, 584, it is said: "Indeed, the law seems quite clearly settled, that a parol promise to pay, made by the indorser to the indorsee at the time of, or subsequent to, the indorsement; an agreement to extend the time of payment; a request made by the indorser for forbearance; * * * all have respectively been considered as a waiver of demand and notice." See also Story on Prom. Notes, § 148; Edwards on Bills and Notes, 634, 635; *Barclay v. Weaver*, 19 Penn. St. 396; *Fuller v. McDon-*

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ald, 8 Greenl. 213; *Boyd v. Cleveland*, 4 Pick. 525; *Lane v. Steward*, 20 Me. 98.

From the bill of exceptions it appears that the plaintiff's testimony on the trial tended to prove that Dye had wheat to sell; that Scott, a grain dealer, bought it on time, and sold it to the Harmar Flouring Mill Company, the maker of the note, at an advance on the price paid, and took the note in suit payable to his order in one day after date, but verbally agreed with the Mill Company that they should have a reasonable time to pay the note; and that on the day of the date of the note he indorsed it to Dye in payment for his wheat.

At the time he said: "I will guarantee this — will back it. They want a little time on it." There was conflict in the testimony, but it was for the jury to decide upon the credibility of the witnesses, and we cannot say, from all the testimony, that the finding that Scott had waived demand and notice, as the jury must have found, was manifestly against the evidence. The language, under the circumstances surrounding the parties at the time it was used, was sufficient to sustain the finding. To save recurring again to this point, I will say here that there was no error in overruling the motion for a new trial, on the ground that the verdict was against the evidence.

[Omitting a minor matter.]

Third. We find no error in the refusal of the court to charge the jury as requested by the defendant.

The charge requested proceeds on the theory that where demand at maturity has been waived by the indorser, that still, when demand is made thereafter, notice of non-payment must be given immediately, and that a failure to do so discharges the indorser. This is not the law. The general rule is that a waiver of demand is also a waiver of notice. Where the words were, "I waive demand of protest," it was held that this language might be construed as implying an intention to waive both demand and notice. *Dan. on Neg. Inst.*, §§ 1090, 1094, 1095. The charge given in connection with that requested was not prejudicial, but favorable to the defendant, as it required such reasonable notice as would show that the indorser was not prejudiced by the delay.

[Omitting a minor matter.]

Judgment of District Court reversed, and that of the Common Pleas affirmed.

Judgment accordingly.

HORNBECK V. STATE.

(35 Ohio St. 377.)

Criminal law — evidence — rape — declarations.

On the trial of an indictment for assault with intent to commit a rape, on the person of a female, who, by reason of imbecility was incompetent to be sworn as a witness, the declarations of such female, made shortly after the assault, are incompetent to prove the commission of the offense.

CONVICTION of assault with intent to commit a rape, on the person of Ada Wyatt. On the trial, after the admission of testimony proving that Ada was twenty-three years of age, but an imbecile, mentally incapable of testifying as a witness, the State called her mother who testified that on the day of the alleged assault she was absent from the house for a short time, having left Ada in the care of her grandmother, during her absence. That as she was returning to the house, Ada came and met her, and told her that a peddler of rat medicine had been at the house in her absence. The witness was then permitted under objection to give Ada's declarations as to what the peddler had done to her in the wood-house, which declarations tended strongly to prove the commission of the alleged offense.

Abston & Court, for plaintiff in error.

T. E. Powell, for defendant in error.

GILMORE, C. J. Ada Wyatt not having been examined as a witness, did the court err in admitting her declarations in evidence?

In this State, it is well settled, that where the prosecutrix in a case of this nature has been examined as a witness, the declarations made by her immediately after the offense was committed, may be given in evidence, in the first instance, to corroborate her testimony. *Johnson v. State*, 17 Ohio, 593; *Laughlin v. State*, 18 id. 99; *McCombs v. State*, 8 Ohio St. 643.

This is as far as the decisions have yet gone.

But it may be said that in the case before us Ada Wyatt was incapable of testifying, and that this fact distinguishes it from the cases above cited.

Hornbeck v. State.

In England it was at one time thought that where a rape was charged to have been committed on an infant of such tender age that in point of capacity she could not be sworn, yet that she ought to be heard without oath to give the court information ; though of itself, without the concurrence of other proofs, that might render the thing probable, her unsworn statement would be insufficient to convict the offender. The reasons that Lord HALK gave for hearing such an infant, though not on oath, were : " First the nature of the offense, which is for the most part secret ; and no other testimony can be had of the fact itself, though there may be other concurrent proofs ; next, because if the child complain presently of the wrong done to her to the mother or other relations, their evidence on oath shall be taken." 1 East's P. C. 441 ; 4 Bl. Com. 214. And in *Brazier's case* (1 East's P. C. 443), who was tried for assaulting an infant five years old with intent to ravish her, Mr. Justice BULLER was of opinion that as the child was incapable of taking an oath, what she said respecting the attempt was receivable in evidence ; and the prisoner was convicted. But he reserved the case for the opinion of the judges, whether this evidence ought to have been received. " On the 29th of April (1779), all the judges being assembled, they unanimously agreed that a child of any age, if she were capable of distinguishing between good and evil, might be examined on oath ; and consequently, that evidence of what she said ought not to have been received. And that a child, of whatever age, cannot be examined unless sworn." 1 East P. C. 444.

And it has subsequently been held there that where the prosecutrix was not at the trial, in the case of rape, evidence of complaint made by her recently after the outrage, was properly rejected. *Reg. v. Guttridges*, 9 C. & P. 471. More recently it has been held, in case of rape, that where the child, from her tender age, was incompetent to be sworn, evidence would not be received " of what the child stated to the mother shortly after the alleged offense took place, nor allow the mother to prove that the child mentioned to her the name of any particular person." *Reg. v. Nicholas*, 61 E. C. L. 246.

To the same effect are the cases of *People v. McGee*, 1 Den. 19, and *Weldon v. State*, 32 Ind. 81.

The last three cases cited declare the principle that must govern the case before us. That principle is, that in cases of violence to the person, except when made *in extremis*, the declarations of the injured party are hearsay, and therefore inadmissible to prove the of-

fense; and the fact that the declarant is incapable of taking an oath, by reason of imbecility, insanity, or infancy, will not justify a departure from the long and firmly-established role of evidence on the subject. Therefore, while we do not restrict the scope of the rule as to the declarations of the female, made shortly after the violation or attempted violation of her person, as established in this State, being receivable in corroboration of her testimony, we do hold that such declarations are not receivable as evidence in chief to prove the commission of the offense, and that there was error in admitting them in this case.

But it may be said that the declarations of Ada were admitted "only to show how she was conducting herself when the mother found her;" that they were competent for this purpose, and that the court excluded them from the jury for any other purpose.

We do not wish to be understood as holding that evidence of how she was conducting herself, the condition of her person as to injuries, and the condition of her clothing as indicating that she had been abused, when her mother found her, were not admissible in evidence. Very clearly such evidence was competent. But it was the declarations of Ada, as to what the peddler of rat-medicine had said and done to her, that were objected to. It will be observed that these declarations not only tended to prove facts by which the accused could be identified, but also to prove the *corpus delicti*. There was other evidence tending to prove that the offense might have been committed, but aside from these declarations there was no other evidence, even tending to directly connect the accused with the commission of the offense. He was not seen by any witness in or about the wood-house where Ada's declarations tended to prove the offense was committed, or nearer thereto than the highway in front of the house. Without these declarations being in evidence, we do not see how a conviction could have been had. It is manifest to us that notwithstanding the instructions of the court excluding the declarations for any purpose other than that above stated, the jury must have disregarded the instructions, and taken the declarations of Ada as proof of the offense charged. The error of the court in admitting the declarations was not cured by the instructions given to the jury in respect thereto. They were still prejudicial to the accused.

From what has been said it will be seen that in our opinion there

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was also error in overruling the motion for a new trial on the ground that the verdict was against the evidence.

The judgment is reversed, and the cause remanded to the Court of Common Pleas for a new trial.

Judgment reversed.

WILLIAMS V. URMSTON.

(35 Ohio St. 236.)

Marriage—charge of wife of separate estate as surety by note.

A married woman having a separate estate, may charge the same, in equity, by the execution of a promissory note as surety for her husband or another, without express words of charge. (*See note, p. 617.*)

ACTION to subject the separate estate of Mrs. Williams to the payment of a promissory note, of which the following is a copy:

“\$503.88.

MILLEVILLE, OHIO, Aug. 5, 1870.

On or before the first day of January next, we, or either of us, promise to pay unto Urmston & Hancock, or their order, the sum of five hundred and three dollars and eighty-eight cents, value received, with ten per cent interest till paid.

JAMES WILLIAMS,
MARY J. WILLIAMS.”

[U. S. Revenue Stamp, canceled, 30c.]

The note was executed by said Mary J. Williams as surety for her husband, James. She had separate property. The plaintiff had judgment below.

Butterworth & Vogeler and J. E. Neal, for plaintiff in error.

Thomas Millikin and Israel Williams, for defendants in error:

BOYNTON, J. The District Court found from the evidence that the plaintiff in error intended to charge her separate estate with the payment of the note sued on, and decreed accordingly. The question now presented is, was there error in such finding? It has long been the settled law of this court, that a finding of facts, from

the evidence, by the court trying the cause, will not be disturbed by a reviewing court, unless it clearly appears that such finding was not sustained by the evidence given at the trial. *Merrick v. Boury*, 4 Ohio St. 60; *Dean v. King*, 22 id. 134. But we need not invoke the application of this rule to the present case, as we are of the opinion that the finding was fully warranted by the evidence.

The husband of the plaintiff in error, at the time the note was executed, was, to her knowledge, wholly insolvent. When the debt was contracted for which the note was given, as well as at the date of the note, she was possessed of a valuable separate estate, of which fact the defendant in error had knowledge; and according to the testimony of one of them, she assured them that the goods for the payment of which the note in part was given should be paid for. The time for the payment of the note was extended for the period of nearly six months from its date. In view of these facts, the inference is, at least, a reasonable one, that by executing the note as surety for her husband, she thereby intended to charge her separate estate with its payment. It is not claimed that she was deceived or imposed upon, or subjected to any improper or undue influence, or that she executed the note for any other purpose or object than the one naturally to be implied from the act itself, and the circumstances surrounding it.

The power of a married woman to bind her separate estate, in equity, for the payment of a promissory note, on which she becomes a surety, although denied in *Perkins v. Elliott*, 23 N. J. Eq. 526, is sustained by a great weight of authority. It rests on the principle, now well settled in courts of equity, that as respects her separate estate, she is to be treated as a *feme sole* to the extent of her power of disposition over the same, and as fully capable of binding it by engagements entered into in respect to it as if the common-law disability of coverture were removed. And except in cases where she may bind herself at law, the principle applies to separate estates under the statute, as well as to estates settled to her sole and separate use, by deed or devise. Any engagement that she could enter into were she *sui juris*, and by which she could create a debt binding at law, she may in equity charge upon her separate estate, unless in so doing she exceed the limitation, if any there be, upon the *jus disponendi*. Pollock on Principles of Contracts, 73.

Where this charge is made, her estate in equity becomes the debtor, and as courts of law deal only with the legal rights and

liabilities of parties, and are therefore incapable to give relief where no legal liability has been incurred, courts of equity carry the intention into effect by subjecting the estate to the payment of the debt intended to be charged upon it. In view of this power of a married woman having an estate to her solo and separate use to bind it by her engagements, we think it justly follows that when she executes or joins her husband or a stranger in executing a promissory note upon a valid consideration moving to her or him, an inference arises, where no fraud or imposition is shown, that she thereby intended to charge her separate estate with its payment. That *Levi v. Earl*, 30 Ohio St. 147, is opposed to this view is undoubtedly true, but a careful examination of that case has satisfied us that the conclusion reached is not only against the weight of authority but is founded on a misconception of the principle upon which some of the cases reviewed in the opinion proceed, particularly of the case of *Johnson v. Gallagher*, 3 DeGex, F. & J. 494. The bill in that case sought to charge the separate estate of Mrs. Gallagher with the payment of a bill of goods purchased by her while living apart from her husband. The opinion of Lord Justice TURNER is an exhaustive examination of the nature and extent of the rights and remedies of the creditors of married women against their separate estates. The particular question involved was whether in the circumstances of that case the separate estate of Mrs. Gallagher was chargeable with the payment of the price of the goods purchased. The conclusion was reached, that living apart from her husband, and having a separate estate, the court was bound to impute to her, when purchasing the goods, an intention to deal with her separate estate unless the contrary was clearly proved. In reviewing the English cases bearing on the subject, for the purpose of ascertaining the circumstances from which an intention to charge the separate estate of a married woman with her engagements will be implied, the lord justice marks a clear distinction between bonds, bills and promissory notes, and what he denominates her general engagements. The learned judge delivering the opinion in *Levi v. Earl* seems to have overlooked this distinction, and to have applied the reasoning designed to show when and under what circumstances an intent upon the part of a married woman to charge her separate estate with her general engagements will be implied, to the question of the liability of her estate for the payment of her promissory notes.

This is apparent from the citation given on page 181, of language ascribed to Lord Justice BRUCE, but which evidently is taken from the opinion of Lord Justice TURNER, 3 De G., F. & J. 514. The citation is: "Upon the whole, I have come to the conclusion that not only bonds, bills and promissory notes of married women, but all their general engagements may affect their separate estate." The language actually employed was that "not only bonds, bills and promissory notes, but also their general engagements, may affect their separate estate."

That the same presumption of an intention to charge the separate estate does not arise where the engagement is one from which, were the married woman *sui juris*, the law would imply a promise to pay the debt contracted, as when the promise is express and in writing, is very clearly shown by that case. No question is made or doubt suggested, that where the engagement is by promissory note, the intention to charge is imputed without the aid of extrinsic proof, but when not in writing, it must be made to appear that the engagement was made with reference to or upon the faith or credit of the estate; a question of fact to be determined by the court upon all the circumstances of the case.

On page 510 of the report of *Johnson v. Gallagher* the lord justice says: "There are many cases which have established that bonds, bills of exchange, and promissory notes of married women are payable out of their separate estates. There has indeed been much question as to the mode in which these instruments take effect against the separate estate, a point to which I shall presently advert, but that in some mode or other they take effect against it cannot upon the authorities be denied. It has been a more disputed and is a more doubtful question, whether the separate estates of married women are liable for their general engagements, such as tradesmen's bills and claims of that description."

He then proceeds to show, that such bills and claims are chargeable against the estate, where the debt was incurred on its faith or credit, and that the *corpus* of the estate is chargeable with their payment, if within the power of disposition given to the married woman by the instrument creating the estate. We are not now dealing with the question whether the distinction taken in *Johnson v. Gallagher* between a general engagement and one created by bond, bill of exchange, or promissory note, is well or ill-founded. It answers our present purpose to show that the distinction there

exists, and consequently, that the court in *Levi v. Earl*, fell into an error in supposing that the reasoning in the former case lends any support to the judgment rendered in the latter. The doctrine, however, laid down by Lord Justice TURNER has been distinctly approved in *Picard v. Hins*, L. R., 5 Ch. App. 274, and in *London Chartered Bank of Australia v. Lempriere*, L. R., 4 P. O. 572. In the former case, Lord Chancellor HATHERLEY said it was very desirable that the position of a married woman, who contracts as if she were *feme sole*, should be placed on a well understood basis, and that that had been done by Lord Justice TURNER in his judgment in *Johnson v. Gallager*.

Mr. Pollock, in his late work on the Principles of Contract, 68, in classifying the cases or instances in which, by the law of England, the intention of a married woman to charge her separate estate will be implied, says that such intention is presumed in the case of debts contracted by a married woman living apart from her husband, and adds, that "the like intention is inferred where the transaction would be otherwise unmeaning, as where a married woman gives a guaranty for her husband's debt, or joins him in making a promissory note." This was the principle upon which the case of *Davies v. Jenkins*, L. R., 6 Ch. D. 728, decided in 1877, was determined.

In this country the authorities on the subject of the power of a married woman to create a charge against her separate estate as surety, seem to be divided into four classes. 1st. Those that deny the power out and out. 2d. Those that admit the power, but require the instrument creating the debt to disclose the intent, to charge in express terms. 3d. Those that hold the intent to bind the estate, or to pay the debt out of it, will be presumed from the mere execution of a promissory note. And 4th. Those that deny that such presumption or inference arises unaided by extrinsic proof. The first of these classes has no bearing on the point under discussion, and the rule adopted in the second has never been recognized as the law of this State. The question as between the other two resolves itself into this :

What inference is to be drawn from the act of a married woman having an estate to her sole and separate use, in signing the promissory note of another, as surety, as respects her intention or purpose in so doing. In view of the fact that in the act of signing she incurs no legal liability, the question admits of but one rational an-

swer, and that is, in the absence of proof showing fraud or imposition, that she intended thereby to make the debt a charge upon her separate estate. Unless this inference is drawn, her act becomes wholly vain and frivolous, and entirely destitute of a purpose or a meaning.

That such is the natural implication from the act of signing has been distinctly affirmed in numerous cases.

In *Bell v. Kellar*, 13 B. Monr. 381, the rule was stated as follows: "If a *feme covert*, having a separate estate, make or indorse a note, the presumption is that it was the intention, and the effect is, to charge her separate estate."

In *Cowles v. Morgan*, 34 Ala. 535, it was held that, "a promissory note executed by the wife during coverture, jointly with her husband, is a charge upon her separate estate created by contract."

So, in *Burnett v. Hawpe's Ex'r*, 25 Gratt. 481, it was held, that "if a wife contracts a debt for herself, or for her husband, or jointly with him, the instrument executed by her is sufficient to charge her separate estate, without any proof of a positive intention to do so, or even a reference to such estate contained in the writing."

In *Metropolitan Bank v. Taylor*, 62 Mo. 338, it was held that, "in reference to her separate estate, a married woman is to be treated as a *feme sole*, and the giving of a note, or making of a written contract by her, raises the presumption that she intends to bind her estate." This case was on a note executed by the wife as surety for her husband.

The same rule prevails in Kansas. *Deering v. Boyle*, 8 Kans. 523; s. c., 12 Am. Rep. 480; *Wicks v. Mitchell*, 9 Kans. 80.

Judge STORY, in commenting on the subject, says: "Indeed, it does seem difficult to make any sound or satisfactory distinction on the subject as to any particular class of debts, since the natural implication is, that if a married woman contracts a debt she means to pay it, and if she means to pay it, and she has a separate estate, that seems to be the natural fund which both parties contemplated as furnishing the means of payment." 2 Story's Eq. Jur., § 1400. See also, to the same effect, 1 Bish. on Mar. Women, § 873.

In *Avery v. Van Sickle*, 35 Ohio St. 270, we held, that where a married woman executed a promissory note for property acquired by her, an implication arises, in the absence of proof showing a different understanding, that she thereby intended to charge her separate estate with its payment. If she executed the note upon

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the understanding that her separate estate was not to be bound for its payment, its enforcement against her would operate a fraud upon her. No one will pretend that this could be done. But when she executes a note, either as principal maker or surety, and has not been deceived in so doing, nor subjected to any undue influence, we think a just inference arises that she thereby intended to deal on account of her estate, and to bind the same in equity for the payment of the note; and that as a necessary result a court of equity will give effect to such intention by subjecting the estate to the payment of the note in the mode prescribed by the statute for enforcing claims against the separate estate of a married woman. Her liability, or rather that of her estate, does not depend on whether or not the debt incurred on its account is beneficial to her or otherwise. If made, and no fraud or imposition is shown, the court cannot refuse relief from the mere fact that the engagement entered into proves unprofitable or injurious. It follows from this result that *Levi v. Earl*, *supra*, and *Rice v. Railroad*, 32 Ohio St. 380; s. c. 30 Am. Rep. 610, in so far as they are in conflict with the principle on which the present case is determined, must be overruled.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Singer Mfg. Co. v. Harned*, Kentucky Court of Appeals, February, 1881, husband and wife gave their note for a sewing machine. They were house-keepers, the husband insolvent, and the wife had no property. Afterward she acquired property, and suit was brought to subject it to the payment of the note. Held, that the sewing-machine was under the facts a necessary, and that when a married woman signs a writing evidencing a debt for which she might bind her separate or general estate, the presumption is that the writing was intended to bind such estate; otherwise it is of no effect, as ordinarily she cannot contract, and it must be inferred that something was intended by entering into the agreement.

PRATT V. STATE.

(35 Ohio St. 514.)

Marriage — paraphernalia — larceny of.

Necessary and suitable clothing furnished by a husband to his wife, or purchased by her with money or means given to her by her husband for that purpose, does not become her separate property within the meaning of the statute concerning the rights and liabilities of married women.

But such articles purchased by a wife with her separate money or means are made her separate property by that statute, and a conviction for the larceny of such goods under an indictment laying the property in the husband cannot be sustained, although the goods were stolen from the family residence.*

CONVICTION of grand larceny. The indictment charged the larceny of certain goods and chattels, the property of John F. Patton, to wit: Certain specified feminine wearing apparel. The testimony showed that it was partly bought with means furnished the wife by the husband, and partly with her own individual means. The opinion states the facts.

James A. Cook, for plaintiff in error.

George K. Nash, attorney-general, and *T. L. Magruder*, for State.

McILVAINE, C. J. The jury found the value of the property stolen to be \$35.00 — the minimum sum constituting grand larceny; and it is quite evident, from the testimony, that this finding included the value of each article mentioned in the indictment. Hence the conviction was wrong, if any article named was improperly laid as the property of John F. Patton; or if the actual market value of the goods was the only criterion of their worth.

It is not disputed, that at common law, an indictment for the larceny of a wife's wearing apparel, laying the property in the husband, was good. It is contended, however, that under our statute the rule is different. The act of March 30, 1871 (68 Ohio L. 48), provides: "Any personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture by gift, bequest, or inheritance, or by purchase with her separate money or means * * * shall, together with all the income, increase and profits thereof, be and remain her separate property, and under her sole control, and shall not be liable to be taken by any process of law, for the debts of her husband. This act shall not affect the title of any husband to any personal property reduced to his possession with the express assent of his wife, provided that said personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care or protection thereof," etc.

* See *State v. Pitts* (12 S. C. 180), 32 Am. Rep. 508, and note, 520.

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Notwithstanding the very comprehensive terms of this statute, a majority of the court are of the opinion that they do not embrace the wearing apparel of the wife, furnished by the husband, or purchased by her with money or means given to her by the husband for that purpose. As to such property, it was not intended by the statute to deprive the husband of all ownership and control, for surely, while the duty of the husband to furnish his wife with necessary and suitable clothing is continued, it was not intended to deprive him of the right to control and preserve it. Nor does it make any difference where a wife purchases her apparel with pin money given to her by her husband to be expended according to her will and pleasure. Of such property the possession of the wife is the possession of the husband.

It has been held, however, by the Supreme Court of Indiana that a statute similar to ours operates as to clothing of the wife acquired otherwise than from the husband, or through his means, so as to invest her with a separate estate therein. *Stevens v. State*, 44 Ind. 469. See, also, *Davis v. State*, 17 Ala. 415; *Hawkins v. Prov. & Worcester R. Co.*, 119 Mass. 596; s. c., 20 Am. Rep. 353; *Thomas v. Thomas*, 51 Ill. 162; 1 Am. Law Reg. 434.

And we are inclined to think that there is good ground for the distinction. Where the wife's clothing is furnished by the husband, in discharge of his marital duty toward her, the statute does not divest him of the property contrary to his intentions; while on the other hand, where the property is otherwise acquired by the wife, the statute simply prevents a title vesting in him by virtue of his marital relation. Under the statute the "gift," which is declared to be the separate property of the wife, is a voluntary one, as all gifts must be, and does not embrace necessities which a husband is under a legal duty to furnish his wife.

From the testimony in the record before us it appears that the wife bought the shawl with her "individual means;" whether these means came from the husband or not is not disclosed; but whether they did or did not, the jury were instructed to find the property in the husband if they found that the shawl was "in his custody and under his control" at the time of the larceny. And it is quite evident from the whole record that the court below was of opinion, and that the jury may have so understood, that the mere fact that the goods were in the dwelling-house of the defendant, where he was living with his wife, put them "in the custody and under the

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control" of the husband, so as to vest in him such a special property as would authorize a conviction under the indictment. To say the least, this instruction was misleading. The jury ought to have been told that if the shawl was not purchased with money given by the husband to his wife, the mere fact that the shawl was stolen from the family residence did not authorize a finding of the property in the husband as charged in the indictment.

[Omitting a minor question.]

Judgment reversed and cause remanded for a new trial.

PENNSYLVANIA COMPANY V. MILLER.

(35 Ohio St. 541.)

Carrier — baggage — merchandise — warehouseman.

A carrier of passengers does not insure the safety of samples of merchandise, delivered by a travelling salesman to him as baggage, yet by receiving, carrying, and putting them into his warehouse for safe keeping, he becomes bound to ordinary prudence in their care.*

ACTION of damages for loss of a valise, containing samples of merchandise, delivered by a travelling salesman to a common carrier as baggage, carried to the destination, and there placed in the carrier's warehouse. It was stolen therefrom by burglars. The plaintiff alleged that the warehouse was insecure and unsuitable. The court charged: "The only question is as to the liability of the defendant after the goods were landed at Forest, and that question will be whether defendant took such care of the property as the law would require it to do. When a railroad company takes baggage for a passenger its liability is of the highest sort. It agrees to carry the baggage safely, and insures (as seems to be admitted) against all sorts of risks, except the acts of God or the public enemy. But when the baggage is landed, it is the duty of the owner to call immediately, or as soon as the throng and hurry incident to the arrival and departure of the train has subsided, and get his property. But if he fails to thus call, and the agent of the

* See *Albany v. Boston & Albany R. Co.* (136 Mass. 131), 30 Am. Rep. 607.

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railroad company takes charge of it, then responsibility will be changed. It will be the responsibility of a warehouseman instead of that of a common carrier. The liability will be to take such care of the property as an ordinarily prudent man would of his own property under the like circumstances. You will therefore look at all the circumstances of this case, and see whether the railroad company's agents did in this case take such care as a prudent man would under like conditions and surroundings. * * * All the defendant is required to do is to take ordinary care under the circumstances, such as men usually exercise in their own concerns. The defendant is not liable for theft of the goods unless it is the result of the want of proper care." The plaintiff had judgment below.

J. T. Brooks, for plaintiff in error, cited *Macroy v. Railroad Co.*, 6 Q. B. 612; *Railroad Co. v. Shepperd*, 8 Exch. 30; *Cahill v. Railroad Co.*, 13 C. B. 818; *Phelps v. Railroad Co.*, 19 id. 321; *Wilson v. Railroad Co.*, 56 Me. 60; 9 Wend. 85; *Pardee v. Drew*, 25 Wend. 459; *Hawkins v. Hoffman*, 6 Hill, 586; *Stoneman v. Railroad Co.*, 52 N. Y. 429; *Perley v. Railroad Co.*, 65 id. 374; *Sloman v. Railroad Co.*, 67 id. 208; *Weeks v. Railroad Co.*, 72 id. 50; s. c., 28 Am. Rep. 104; *Jordan v. Railroad Co.*, 5 Cush. 69; *Collins v. Railroad Co.*, 10 id. 506; *Stimpson v. Railroad Co.*, 98 Mass. 83; id. 371; *Railroad Co. v. Shea*, 66 Ill. 471; *Railroad Co. v. Carrow*, 73 id. 348.

Wm. Lawrence and *Joseph H. Lawrence*, for defendants in error.

I. When the baggage of a railroad passenger is unclaimed at its destination, it is the duty of the railroad company, as a common carrier, to store it in a proper and secure place until called for, and when so stored the carrier becomes liable therefor as a warehouseman, charged with the duty to take ordinary and reasonable care of it. *Bartholomew v. St. Louis R. R.*, 53 Ill. 227; s. c., 5 Am. Rep. 45; *Mote v. Chicago & N. W. R. R. Co.*, 27 Iowa, 22; s. c., 1 Am. Rep. 212; *Ouimit v. Henshaw*, 35 Vt. 605; *Roth v. B. & L. R. R. Co.*, 34 N. Y. 548; *Powell v. Myers*, 26 Wend. 591; *Frances v. Dubuque & S. C. R. R.*, 25 Iowa, 60; *Vanhorn v. Kermit*, 4 E. D. Smith. 453; *Merrill v. Grinnell*, 30 N. Y. 594; *Burnell v. N. Y. Central R. R.*, 45 id. 184; s. c., 6 Am. Rep. 61; *Chicago, Rock Island & P. R. R. v. Fairclough*, 52 Ill. 106.

II. The same rule applies to samples of merchandise carried as

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baggage by travelling salesmen for the purpose of making sales. *Cincinnati & Chicago R. R. v. Marcus*, 38 Ill. 219; *Mich. S. & N. Ind. R. R. Co. v. Oehm*, 56 id. 293; *Camden & Amboy R. R. v. Baldauf*, 16 Penn. St. 67; 2 Redf. Am. Ry. Cas. 267; 2 Smith and Bates' Am. Ry. Cas. 357; *Minter v. Pacific R. R. Co.*, 41 Mo. 503; *Butler v. Hudson River R. R. Co.*, 3 E. D. Smith, 571; *Hannibal R. R. Co. v. Swift*, 12 Wall. 262; *Bartholomew v. St. Louis R. R.*, 53 Ill. 227; *Dexter v. Syracuse, Binghamton & New York R. R. Co.*, 42 N. Y. 326; *Phillips v. Earl*, 8 Peck, 182; 4 Bing. 218; *Relf v. Rapp*, 3 W. & S. 21.

As the railroad company accepted the valise and samples in this case without inquiry, there was an implied contract to carry them as insurer of baggage proper. *Burnell v. N. Y. Central R. R. Co.*, 45 N. Y. 184; *Collins v. Boston & Maine R. R. Co.*, 10 Cush. 506; *Miss. Cen. R. v. Kennedy*, 41 Miss. 671; *Stimpson v. Conn. River R.*, 98 Mass. 83; 2 Redf. on Railw., § 175, 56 u.

The custom of the railroad company to carry samples as baggage for travelling salesmen charges it with a liability for the loss. *McMasters v. Penn. R. R. Co.*, 69 Penn. St. 374; s. c., 8 Am. Rep. 264; s. c., 2 Redf. Am. Ry. Cas. 61.

WHITE, J. [Omitting minor matters.] 2. The valise in question having been safely carried to its place of destination, and there received by the agent of the carrier and placed in its warehouse, the question arising on the charge is whether the rule laid down by the court for the guidance of the jury prescribes a higher standard of care than the law requires. It is claimed, on behalf of the carrier, that it does; and that if the carrier can be held liable at all, it can only be for gross negligence.

As was said in *Griffith v. Zipperwick*, 28 Ohio St. 388, "the term gross negligence is scarcely susceptible of legal definition; but there is a degree of care (indefinitely varied by the nature of the deposit and circumstances of the case) which the depositor has a right to expect from the depositary, the want of which is so designated, and will render the depositary liable if a loss results therefrom."

Accordingly it was held in that case that good faith requires generally that a bailee who is only liable for gross negligence should keep the goods intrusted to him with as much care as he ordinarily keeps his own of the same kind, and that he should also keep them

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with such a degree of care as is reasonable with reference to the nature of the goods and the particular circumstances of the bailment.

In the present case the valise did not contain what was properly baggage. The contents consisted of samples of merchandise, which the agent of the plaintiffs carried with him to facilitate his business in making sales. The implied undertaking of the carrier to insure the safe carriage of baggage did not therefore extend to these goods. He was not, however, for this reason, relieved of all responsibility in regard to the safe carriage and keeping of the property. By voluntarily taking it into his charge and finally putting it in his warehouse for safe keeping, he assumed the relation to it of an ordinary bailee.

The court told the jury that the duty growing out of this relation was to take such care of the property as an ordinarily prudent man would of his own property under like circumstances.

With the general rule thus stated we find no fault, and a less degree of care ought not, in our opinion, to be allowed.

[Omitting minor matters.]

The judgment will therefore be reversed, as well for the refusal of the court to charge as above stated as for refusing to set aside the verdict as being against the evidence.

Judgment reversed.

BYERS V. FARMERS' INSURANCE COMPANY.

(35 Ohio St. 606.)

Insurance — fire — innocent representation of amount of incumbrances — sale or transfer of title — mortgage.

A policy of fire insurance was conditioned to be void in case of any false representation of the condition or occupancy of the property material to the risk. In the application it was asked: "Is the property incumbered? If so state to what amount, and the value of the premises." This was answered: "Yes; mortgage \$3,000 — \$10,000." The mortgage made by the insured was for \$3,900, and \$240 accrued interest was also due on it. The policy made the application part of the contract. *Held*, that the policy was avoided. (*See note, p. 629.*)

A mortgage is not a sale or transfer of title within the prohibition of an insurance policy.*

* To same effect, *Quarrier v. Peabody Ins. Co.* (10 W. Va. 507), 27 Am. Rep. 328; *Dokliver v. St. Joseph F. & M. Ins. Co.*, 128 Mass. 315; *Kronk v. Birmingham F. Ins. Co.*, 91 Penn. St. 300.

ACTION on a fire policy. The opinion sufficiently states the point. The plaintiff had judgment at trial, which was reversed by the District Court.

George E. Seney and Noble & Sutes, for plaintiff in error.

Critchfield & Graham, for defendant in error.

JOHNSON, J. [Omitting a question of practice.] Did the District Court err in refusing to give the charges asked and in charging as stated?

This question involves two distinct legal propositions:

1. As to the effect of the representations made concerning the mortgage incumbrance on the property at the time the contract was made.

2. As to the execution of the second mortgage without the consent of the defendant.

1. As to the representations made by plaintiff concerning the amount of the mortgage.

The policy provides that "the application and description of the property insured and referred to in this policy shall be considered as part of this contract, and any false representations by the assured of the condition or occupancy of the property, or any material fact material to the risk, * * * this policy shall be void."

The representation was that the mortgage was only \$2,000. The truth was that it was \$3,440; including \$240 of accrued interest.

That this was a representation material to the risk admits of no controversy. *Hutchins v. Cleveland Mut. Ins. Co.*, 11 Ohio St. 480; *Davenport v. New Eng. Ins. Co.*, 6 Cush. 340; *Hayward v. New Eng. Ins. Co.*, 10 id. 444; *Brown v. People's Ins. Co.*, 11 id. 280; *Jacobs v. Eagle Ins. Co.*, 7 Allen, 132; *May on Ins.*, § 200; *Flanders on Ins.* 280.

The request to charge was that this representation, being untrue, avoided the policy. The charge given was that it did not, that it was only a representation, and not a warranty, and was no defense.

No evidence was offered tending to show that the insured was guilty of moral falsehood or fraud in making this false statement, other than the presumption that arises from the fact that it was a mortgage made by himself, and therefore he knew, or must be presumed to have known, his statement was false.

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From this fact alone, it might be fairly inferred that the applicant knew his statement was false. Waiving this consideration, let us examine the request to charge and the converse of it, which was given by the court.

It is based on the assumption that there was no intentional fraud by the assured, and that being a representation merely, and not a warranty, the falsity of the statement would not defeat a recovery.

This policy was issued under an express agreement that the application and description of the property insured shall be considered part of the contract, and upon the condition that any false representation of any material fact avoided it. This made the statements as much a part of the contract as if written in the body of the policy. The two papers must be treated together as constituting the contract, as if both were embodied in one paper.

An express warranty is always a part of the contract as completed. A representation is a verbal or written statement made by the assured, as to the existence of some fact or state of facts tending to induce the underwriter to assume the risk. Warranties are conditions precedent to a valid policy, whether such conditions are material or not, if the parties have regarded them as material, and clearly intended them to be so treated.

In such cases, when the parties have stipulated that certain things shall constitute conditions, courts, as a general rule, will not inquire whether they be material to the risk or not. It is enough to know that they influenced the risk, and that the parties have fairly made them the basis of the contract. It does not follow however, that all statements in the application, and made part of the policy, are necessarily warranties which avoid the contract, if not literally fulfilled. A discussion of this point would lead us beyond the proper scope of this case.

The law of marine insurance undoubtedly is, that a warranty must be exactly and literally fulfilled as a condition precedent, whether in fact material to the risk or not, and the great weight of authority probably is that this is true of fire insurance, though the courts have been astute in discriminating between cases, when the statements are representations, rather than technical warranties, even though called such.

In *Glendale Mfg. Co. v. Protection Ins. Co.*, 21 Conn. 32, it was said: "We are by no means confident that representations in surveys preceding the issue of fire policies, extending, as they do, to

the present and future condition of the property about to be insured, have been considered as technical warranties, to be true to the letter for a long series of years, and not rather as representations, to be at the time and thereafter substantially exact and true. Nor are we certain that a mere reference to these representations, made in the body of the policy, in order to explain the rights and obligations of the parties, does necessarily change their character from representations to warranties."

We are relieved from the discussion of this question, because it is only a false representation material to the risk that avoids this policy, and this representation, shown to be untrue, was as to an existing fact, material to the risk.

This being so, the question is, does this representation avoid the policy without proof of fraud?

Contracts of insurance, like all others, must have a reasonable construction. Being contracts for indemnity, they should, in case of ambiguity, receive that construction which is consonant with the intention of the parties. Where there are two interpretations equally deducible from the terms, that which enforces rather than avoids the policy should be preferred. Established principles of construction applicable to other contracts are equally so in insurance contracts.

At common law, a warranty of a fact, in a material matter, is a guaranty that the fact is as stated, and it is sufficient to show its non-existence without also showing that it was fraudulent, but in case of a representation, not amounting to a warranty, it must appear that it was fraudulent as well as false.

In this case, therefore, if the plaintiff warranted that the property was only incumbered \$2,000, when in fact the mortgage was \$3,440, he is bound, though not guilty of fraud or moral falsehood.

In this contract this material representation is expressly made a condition in the policy, and therefore is a warranty. The fact that it was not true of itself avoided the policy by the terms of the contract.

Instead of a contract of insurance, suppose it was a contract of sale of this land by plaintiff to defendant for an agreed consideration, the vendor covenanting that the property was not incumbered beyond \$2,000, and the fact should turn out that the mortgage was \$3,440. Does any one claim that the vendee could not recover without showing fraud or moral falsehood?

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Having expressly covenanted that the property was only incumbered for \$2,000, he would be bound to make that covenant good. This is equally true when the covenant is as to a condition precedent.

In *Davenport v. New England Ins. Co.*, 6 Cush. 340, the question was: "Is the property incumbered?" The answer was in the negative. The court say, after holding that the fact is material: "It is manifest that the defendants deemed this information material." "The plaintiff having given an untrue answer, whether by accident, mistake, or design, it matters not, to a direct, plain, and practical question, can not now be heard to say it was immaterial."

In *Hayward v. New England Mut. Fire Ins. Co.*, 10 Cush. 444, the insured was asked: "'Is the property incumbered? If so, how much?" The answer was: 'About \$3,000.' In fact, it was mortgaged for \$4,000. It is said this inquiry was material, and the defendant had a right to require that the answer should be substantially true." And it was held that not being substantially true, he cannot recover."

To the same effect is *Brown v. Peoples' Mut. Ins. Co.*, 11 Cush. 280, where the question was, whether the property was incumbered, to whom, and what amount. The answer was: "About \$4,000; to A. B." When in fact there were two mortgages; one to A. B. for \$3,600, and another to J. P. for \$1,100. *Held*, that the policy was void. In that case the condition was: "If the representations made in the application do not contain a just, full, and true exposition of all the required facts and circumstances in regard to the title, condition, situation, value, and risk of the property insured, the policy shall be void."

In *Jacobs v. Eagle Ins. Co.*, 7 Allen, 132, the answer was that there were two mortgages of \$2,700 in all, when in fact there was \$300 of accrued interest. The condition there was much like the case at bar: "If any of the above statements are false or incorrect, any policy issued thereon shall be void." The representation avoided the policy.

Anderson v. Fitzgerald, 4 H. L. Cas. 484, may be regarded as the leading case upon this point, because of the great deliberation it received at the hands of the most eminent jurists of Great Britain. There the policy contained a proviso that "if any thing so warranted shall not be true, or if a circumstance material to this insur-

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ance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statements made, etc., the policy shall be void." The point on which the case finally turned was whether it should be left to the jury to say whether certain answers made by the insured were material as well as false, and it was held that the representations being made part of the contract, their truth and not their materiality was the question for the jury. In discussing this point, the difference between a moral falsehood and a representation untrue in fact, but not intentionally so, was considered, and a majority of the judges held that the condition of the policy was broken if the representations were untrue, though there was no intentional falsehood. Baron PARKE says: "A doubt may possibly exist whether the word 'false' is to be understood in the sense of false in point of fact or morally false, though I believe most of us think that it is not to be limited to moral falsehood."

This case is cited and approved in *Jeffries v. Life Ins. Co.*, 22 Wall. 47.

In that case the distinction is noted between answers in an application which do not relate to the risk, that do not necessarily avoid the policy unless they influence the mind of the underwriter, and those where it is expressly covenanted as a condition of liability that the statements and declarations contained in the application are true.

The court say that when the truth of such statements forms the basis of the contract, and are expressly made conditions of liability, they know of no respectable authority which holds that the policy is not avoided.

The case of *Protection Ins. Co. v. Harmar*, 2 Ohio St. 452, is relied on by plaintiff in error, and deserves special attention. The distinguishing feature of that case is that the representations made in the application were not warranties, because not made so by the terms of the policy. In that case the only reference to the application was in these words: "For a more particular description of said premises see survey No. 74, furnished by the insured, which is hereby made part of this policy."

Only so much of the application as constituted a description was held to be made part of the policy.

The other answers were held to be representations only, and not warranties. In the case at bar the entire application, including the statement as to incumbrances, as well as a description of the

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property, is expressly made the basis of the contract. The same distinction is found to exist in other cases relied on by the plaintiff.

2. The second request which was refused was that if after said policy was issued the plaintiff further incumbered the property, without defendant's consent, the plaintiff could not recover.

The fact was proved that the plaintiff did, without such consent, make a second mortgage for some \$400.

The condition of the policy on that subject is in these words: "If the property be sold or transferred, or any change take place in the title, either by legal process or otherwise, * * * this policy shall be void."

We do not think that the execution of a second mortgage on the real estate was in any proper interpretation of the words either a sale, transfer or change of title which avoided the policy.

This conclusion is supported by numerous well-considered cases. *Com. Ins. Co. v. Spankneble*, 52 Ill. 53; s. c., 4 Am. Rep. 582; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *May on Ins.*, § 269, and cases in note.

Judgment of the District Court reversing the Common Pleas affirmed and cause remanded.

Judgment affirmed and cause remanded.

NOTE BY THE REPORTER.—Mr. Wood says (*Fire Ins.* 302): "It is of no importance whether the concealment or mis-statement relates to the entire absence of incumbrances, or as to the amount thereof. If the amount of the incumbrances is stated at a less sum than is actually due, the policy is void." "An overstatement does not have that effect. If the policy requires a true statement, or if the application is made a part of the contract, this rule prevails, and it seems the same is true even if the application is not made a part of the contract, because it is a concealment or misrepresentation of a material fact." *Id.* 337. "Inquiry makes the representation material." *Id.*

Thus, in *Jacobs v. Eagle Mut. Fire Ins. Co.*, 7 Allen, 133, where the application was part of the policy, the representation was of two mortgages of \$2,700, one of \$1,150, the other of \$1,550, whereas there was interest accrued on the first to \$300 additional. It was said that the policy was invalid. The court said: "It is perhaps unnecessary to consider this question; but they continued: "We do not suppose entire precision is requisite in such a statement, or that the omission to state a small amount of accumulated interest would avoid the policy. But this was not such a case." The interest "became in this case a substantial part of the incumbrance, and it is difficult to see why to that extent this statement as to the existing incumbrances on the property was not false." So, in *Hayward v. N. E. M. F. Ins. Co.*, 10 Cush. 444, where the statement was "about \$3,000," and the real amount was \$4,000. The court said that making due allowance for the word "about," this was a material mis-statement. To hold so wide a deviation from the fact to be immaterial would be to defeat the very purpose which the questions and answers in the application were intended to accomplish, and render them but a vain and idle ceremony." So, where the applicant stated one mortgage, but forgot another. *Towne v. Fitchburg M. F. Ins. Co.*, 7 Allen, 51; *Smith v. Empire Ins. Co.*, 35 Barb. 497; *Battles v. York Co. M. Ins. Co.*, 41 Me. 308.

In *Ryan v. Springfield F. & M. Ins. Co.* 46 Wis. 671, among the questions propounded to the applicant, and the answers thereto, were the following: Q. "Is it (the property to be

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insured) incumbered by any mortgage or otherwise?" A. "Yes, it is." Q. "If so, for what amount?" A. "\$3,000." Q. "Is the property incumbered in any way?" A. "Incumbered by mortgages." Q. "If so, state the nature of the same." A. "Yes, mortgaged to two parties for \$3,000." Q. "Is such property steadily profitable?" A. "Yes." The special findings of the jury upon these questions were as follows: 1. "Were these incumbrances on the premises affected by the insurance, at the time the insured, McMahon, procured the insurance sued for, to a greater amount than \$3,000?" A. "Yes, \$4,581; the whole amount of mortgages." 2. "Did the defendant or its agents at that time know that such incumbrance by mortgages exceeded \$3,000?" A. "No." 4. "Were such premises steadily profitable at the time of the procuring of such insurance?" A. "No." 5. "Do you find for the plaintiff or for the defendant in this action?" A. "We find in favor of the plaintiff." The court said: "In all * * * the reported cases we have consulted, it has been decided as a question of law, that false representation of incumbrances by mortgage upon the property insured is material to the risk. Wood on Ins., §§ 156, 159, 160, 177, 195; *Curry v. Com. Ins. Co.*, 10 Pick. 585; 30 Am. Dec. 547; *Hayward v. Mutual Ins. Co.*, 10 Cush. 444; *Patton v. M. & F. Ins. Co.*, 38 N. H. 338; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507. This court has repeatedly decided that such representations are material to the risk. *Hinman v. Hartford Fire Ins. Co.*, 36 Wis. 159; *Fuller v. Madison Mutual Ins. Co.*, id. 604. And in the latter case, the court, by the chief justice, uses the following language. 'And to that end it is important, not only that the insurer should know the amount of incumbrances on property when insured, but should have notice of subsequent incumbrances.' The intrinsic and essential meaning of 'materiality to the risk' of representations by the insurer, in respect to the property to be insured, and the true test of such materiality, are, that such representations affect and influence the action of the insurer in taking or refusing the risk, or in the amount of premium to be paid. Chief Justice MARSHALL, in *Columbian Ins. Co. v. Lawrence*, 2 Pet. 47, defines this materiality so clearly, and in language so terse and yet so comprehensive, that it may well be adopted by the courts as the very best expression of it that can be made. 'Generally speaking, insurances against fire are made in the confidence that the assured will use all precautions to avoid the calamity insured against, which would be suggested by his interest. The extent of this interest must always influence the underwriter in taking or rejecting the risk, or in estimating the premium. So far as it may influence him in these respects, it ought to be communicated to him. Underwriters do not rely so much upon the principles as on the interest of the assured; and it would seem therefore to be always material that they should know how far this interest is engaged in guarding the property from loss.' This language has been once before quoted approvingly by this court, in the opinion of Mr. Justice LYON in *Hinman v. Hartford Fire Ins. Co.*, *supra*; and the question as to the materiality of such representations should be at rest in this State, and the false representations here found by the jury, both as to mortgage incumbrances upon, and the profitableness of, the property insured, were material to the risk, relied upon by the company, and formed an inducement to the contract of the insurance, and avoid the policy."

To same effect, *Schumlich v. Am. Ins. Co.*, Wisconsin Supreme Court, 1880.

In *Glade v. Germania Fire Ins. Co.*, Iowa Supreme Court, June, 1881, the statement as to incumbrances upon the property was to the effect that they amounted to "about" \$3,000. They in fact amounted, with accrued interest, to \$4,425. Held, that the statement was a misrepresentation that avoided the policy, whether made in good faith or not. The court said: "It is true that in the case at bar the difference was made up, to a considerable extent, of accumulated interest. But that is immaterial. What the companies were entitled to know was, whether the property was imperilled by an incumbrance, because such property does not constitute as desirable a subject of insurance. If it was imperilled, it was of so consequence that the peril resulted largely from accumulated interest, unless we may say that a large accumulation of interest would tend rather more clearly to indicate that the insured was in a desperate condition. We come then to the conclusion, that under the facts shown and the cases cited, there was clearly a misrepresentation in a material matter. The next question is as to whether the misrepresentation had the effect to avoid the policy. It appears to us that it had. We can hardly conceive, indeed, that such a misrepresentation could have been other than the result of bad faith, and not of mere ignorance; but in our opinion it was wholly immaterial as to whether it was or not. It is very common, we

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believe, in making answers which are to become representations, in applications for insurance, whether fire or life, to qualify the answers by the use of the word 'about.' It doubtless often happens that no other than such qualified answer can properly be given. We have never heard it suggested before, that the applicant, in making such answers, is bound to no accuracy or truthfulness whatever, provided only he does not act in bad faith. When an applicant gives a qualified answer, he virtually declines to give an unqualified answer, and in so doing he virtually declares that his information is not such as to justify him in giving an unqualified answer. But while this is so, he must be understood as declaring that his information is such as to justify him in giving the qualified answer which he does give."

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

TINICUM FISHING COMPANY V. CARTER.

(80 Penn. St. 88.)

Constitutional law — damage to fishery.

One is not entitled to damages for injury to his fishery resulting from construction of a pier in a river under license from the State.

ACTION for injury to a fishing right on the Delaware river. The point is sufficiently disclosed in the opinion. The plaintiff had judgment below.

William Ward and Wayne McVeagh, for plaintiff in error.

Aaron Thompson and P. B. Carter, for defendant in error.

PAXSON, J. This case has been so thoroughly discussed in 11 P. F. Smith, 21, and 27 id. 310, that little more remains to be said. While the main point now raised was not expressly decided by either of the former cases, the principles by which it must be disposed of were clearly pointed out. It was held in *Tinicum Fishing*

Co. v. Carter, 11 P. F. Smith, 21, that the plaintiff below was not entitled to recover damages for the injury to his fishery resulting from the construction of a pier out into the river under a license from the port wardens of the city. "As the State," says Justice SHARSWOOD, "might itself have erected or caused to be erected the wharf and pier built by the defendants below, without any responsibility to the plaintiff for any consequential damages to his easement, or right of drawing his seine on the shore, so neither is the grantee or licensee of the State liable for such damage. As to him it is *damnum absque injuria*." This ruling is equally applicable to the erection and maintenance of the stone wall, which is the chief ground of the plaintiff's complaint. The Darby Meadow Company has the right under its charter to protect the meadows by the erection of walls to keep back the water, and if in doing so the plaintiff's rights of fishery are interfered with or even destroyed, he is without remedy. His damages, if any, are merely consequential, and the constitutional provision that compensation shall be made to the owner of property taken for public use, does not apply to such damages. *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101. The meadow company having the right under its charter to construct the wall, it follows that if said wall had been constructed under the authority of, or license from the company, as a part of its system, the defendants would have a right to avail themselves of such authority or license as a defense to this action. Further, if the meadow company neither built, nor authorized its construction, yet if after the wall had been erected, they adopted and maintained it, and had continued to maintain it for more than six years prior to the commencement of this suit, it would be a complete answer to any claim for damages growing out of its construction.

It was certainly error to exclude from the jury evidence to show that in 1868 the fishery was utterly worthless. This error was cured to some extent subsequently by the admission of testimony of a similar character, and is referred to now to avoid misapprehension in the future.

The court below was called upon by the defendants' sixth and seventh points to say that if either by the erection of the pier, or from natural causes, the plaintiff's fishery had been destroyed, the verdict must be for the defendants. The learned judge affirmed these points, with the qualification, that the plaintiff's right must be absolutely obliterated; and that the destruction of the fishery

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must "be full and complete — not partial." Herein we think the learned judge fell into error. There was no question of the obliteration of plaintiff's right. That might continue long after its exercise had become impracticable or unprofitable. Nor was it a question of the absolute destruction of the fishery. It was certainly sufficient for the defendant to show that it was worthless. The plaintiff was suing for damages, and the destruction of a worthless thing could have done him no injury. If the fishery could no longer be fished to profit or advantage, it was worthless. The fact that a few stray shad could be caught there occasionally amounts to nothing.

The first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, twelfth and sixteenth assignments of error are sustained.

The judgment is reversed, and a *venire facias de novo* awarded.

Judgment reversed.

 REESE V. REESE.

(90 Penn. St. 69.)

Evidence — handwriting — expert opinion.

An expert, who has no knowledge of a handwriting in dispute, except from having seen the alleged penman write several times, and that only for the purpose of testifying, is incompetent to give an opinion thereof. (*See note, p. 635.*)

ACTION of debt. The opinion states the point. The plaintiff had judgment below.

Charles H. Pennypacker, for plaintiff in error.

H. H. Gilkyson and William B. Waddell, for defendant in error.

TRUNKEY, J. [Omitting other matters.] Rauch, while waiting as a witness for John Reese, saw him write several times — he wrote at request of his counsel. From knowledge of Reese's handwriting, thus acquired, the witness was incompetent to testify his belief as to the genuineness of the signature in question. It has never been the practice in Pennsylvania to permit a witness to give

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an opinion when taught in that manner. In *Stranger v. Searle*, 1 Esp. 14, the witness had seen the defendant write his name several times, previous to the trial, for the purpose of showing to the witness his true manner of writing. Lord KENYON rejected the testimony, saying: "The defendant might write differently from his common mode of writing his name, through design."

[But on another point], judgment reversed, and a *venire facias de novo* awarded.

Judgment reversed.

NOTE BY THE REPORTER.—In *Doe dem. Mudd v. Suchermore*, 5 Ad. & El. 705, COLERIDGE, J., said: "We best acquire a knowledge of this character by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence; either supposition giving reason to believe that he writes at the time not constrainedly but in his natural manner." See *King v. Donahue*, 110 Mass. 155; a. c., 14 Am. Rep. 599.

In *Keith v. Lothrop*, 10 Cush. 453, the case of *Stranger v. Searle*, 1 Esp. 14, was remarked upon, but it was said that its doctrine had never been extended to the case of a writing made in presence of the witness and after a suit on the disputed note, but in business transactions between them.

In *Reg. v. Crouch*, 4 Cox C. C., 163, to prove that a letter, the subject of indictment, was in the handwriting of the prisoner, a policeman was called who had known the prisoner, but had no knowledge of his handwriting, until he was sent by his inspector, after the letter had been written and suspicions were aroused, to pay the prisoner some money due him from the witness, with directions to procure a receipt from him, that he might see him write, and be able to speak to his handwriting. The witness acted according to those directions and it was proposed to ask him his belief as to the handwriting of the letter in question. The evidence was excluded. This was put on the ground that the knowledge was acquired for the specific purpose of becoming a witness, and is not a case like the principal, where the writer may be said to be making evidence for himself, and therefore not writing in his natural manner. Our rule is more lenient than the English in this respect. See *Commonwealth v. Allen*, ante, p. 356.

In *Osbourne v. Hosin*, 6 Mod. 167, which was debt upon a bond, a subscribing witness was produced and testified, and on the other side was produced a person of the same name as the other subscribing witness, who acknowledged that the hand was like, but said it was not his, and neither witness recognized the other. HOLR, C. J., ordered them both to write their names, and left it to the jury.

In *Williams' case*, 1 Lew. 137, the court asked a person, whose name was alleged to have been forged, to write his name and hand it to the jury with the alleged forgery, and in *Reg. v. Taylor*, 6 Cox C. C. 53, the same was done with the prisoner's signature which the court directed him to make in court.

In *Hayes v. Adams*, 2 T. & C. 598, on a question of the genuineness of an indorsement, the alleged indorser being examined as a witness, was by consent of parties permitted to write her name on the referee's minutes. This was approved by the Supreme Court on appeal. But in *Spence v. Lindo*, N. Y. Com. Pleas, Feb. 1879, the trial justice having admitted in evidence the signature of the plaintiff, written on the trial at the request of the court, on the question of the genuineness of an alleged signature of the plaintiff, no objection being made by either party, judgment being given for the defendant, the plaintiff appealed, and the judgment was reversed.

See also *Hynes v. McDermott*, 82 N. Y. 41

WAYNE COUNTY V. WALLER.

(90 Penn. St. 99.)

Attorney—assigned to defend pauper criminal—compensation.

In the absence of statutory regulation, an attorney assigned by the court to defend a pauper criminal has no claim upon the public for fees or expenses. (See note, p. 640.)

THE opinion states the case. The plaintiff had judgment below.

George S. Purdy, for plaintiff in error.

George G. Waller and *H. M. Seeley*, for defendants in error. A court of general criminal jurisdiction may impose upon a county the expense of boarding and lodging a jury kept together in a capital case. *Commissioners v. Hall*, 7 Watts, 290. The coroner may direct a *post-mortem* examination, and the county must pay the physician as an expert. *Allegheny v. Watt*, 3 Barr, 462. The county in which this court sits is liable for the incidental expenses of the court. *McCalmont v. County of Allegheny*, 5 Casey, 417. The county is liable for expense of fuel to keep prisoners comfortable in jail. *Richardson v. Clarion Co.*, 2 Harris, 200. Counsel assigned for defense of poor defendants in criminal courts have a right of action against the county for their fees. *Reg. v. Fogarty*, 5 Cox C. C. 161; *Blythe v. State*, 4 Ind. 525; *Dane v. Smith*, 13 Wis. 585; *Hull v. Washington*, 2 Green, 473; *Davis v. Linn*, 24 Iowa, 508.

STERRETT, J. This contention arises upon the facts submitted to the court below in the nature of a case stated. The plaintiffs below, attorneys at law, were appointed by the Court of Oyer and Terminer to defend a woman who was indicted for murder. On her petition the court first recommended and subsequently ordered the payment by the county of \$150 to enable her to secure the attendance of witnesses and prepare for trial. The commissioners of the county refused to comply with the request or to obey the peremptory order, claiming that the court had no authority to make it, and that if they acquiesced, they would render themselves personally responsible to the county for the amount so paid. The

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facts, as fully set forth in the case stated, were presented to the court in the following terms viz.:

"If the court shall be of opinion that it was the duty of the county of Wayne, under the direction of the court, to furnish necessary means to enable the counsel assigned by the court to properly investigate the case, and prepare the defense of Mrs. Van Alstine, it is agreed that such necessary expense actually incurred was \$150, and the court shall direct judgment in favor of the plaintiffs against the defendant for that sum."

"If the court shall be of the opinion that the counsel, undertaking and conducting, under assignment by the court, the defense of Mrs. Van Alstine, indicted for murder by poisoning, are entitled to compensation from the county for services so rendered, they shall receive the sum of \$200, and the court shall direct judgment for the plaintiffs against the defendant for that sum, in addition to the sum of \$150 for expenses above stated."

"If the court shall be of opinion that the county is not liable to pay, either for the expense incurred or services rendered by counsel in the preparation and conduct of the defense of Mrs. Van Alstine, then judgment to be awarded to the defendant. Either party to have the right to sue out a writ of error."

The learned judge held that the county was liable for both sums, and entered judgment accordingly; and this is assigned for error.

By the common law, no costs are paid out of the public treasury. In the *County of Franklin v. Conrad*, 12 Casey, 317, it is said the recovery and payment of costs, in criminal cases, are so entirely dependent on statutory regulations in Pennsylvania that it is indispensable for every claimant to be able to point to the statute which entitles him to receive what he claims. We are not aware of any law, common or statute, that requires the county to pay a defendant's costs in a criminal case, or authorizes the court to call upon the county to advance money to be expended by a prisoner or his counsel in subpoenaing witnesses and otherwise preparing for trial. The claim of the plaintiffs below derives no additional strength whatever from the fact that the court first requested and afterward commanded the commissioners to pay the money. No authority can be found for either a request or peremptory order in such case. If the county commissioners had drawn a warrant for the amount ordered by the court, they would have rendered themselves person-

ally liable for the same, as in the case of *Commissioners v. County of Lycoming*, 10 Wright, 496.

The 9th section of the Declaration of Rights gives to the accused, in all criminal prosecutions, the right "to have compulsory process for obtaining witnesses in his behalf." The practice which has obtained, and so far as we know, is recognized in every criminal court, of awarding process and directing the service thereof, at the instance of parties accused of crime, rests upon this sufficient foundation; and no court will turn a deaf ear to the appeal of an impecunious prisoner, who makes timely application for process to bring in his witnesses. It will always be awarded on proper application; the court will see that it is served, and compel the attendance of witnesses. As to the compensation of the clerk who issues, and the officer who serves, the process, and the witnesses who obey it, that is another matter. They cannot be paid out of the public treasury, unless statutory warrant can be found for so doing. In many cases this may be a great hardship, but the remedy, if any is needed, rests with the legislature, not in the courts. As to the officers, such service must be regarded as an incident of official position. They take and hold office *cum onere*. The hardship is greatest on witnesses, especially such as are too poor to pay their expenses while attending court, in obedience to its process, on behalf of an insolvent prisoner. Until otherwise provided for, it must be set to the account of that service which every one at times owes to the government under which he lives and whose protection he enjoys. In *Huntingdon County v. Commonwealth*, 22 P. F. Smith, 80, Chief Justice THOMPSON, speaking of the hardship referred to, expresses regret that suitable legislative provision for such cases does not exist.

It is very clear to us that the county was neither bound to furnish money nor reimburse the defendants in error for the amount expended by them in behalf of the prisoner; and we think it is equally manifest that it was under no legal obligation to compensate them for their professional services. They were officers of the court, and, like others, took their offices *cum onere*. One of these burdens, which custom has recognized, is the gratuitous service rendered to a poor prisoner, at the suggestion of the court. There are however some respectable authorities sustaining, on plausible grounds, the opposite view: *Hall v. Washington County*, 2 Green, 473; *County of Dane v. Smith*, 13 Wis. 585. In the first of these,

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it was held, in an opinion delivered by Chief Justice WILLIAMS, that inasmuch as the Constitution of Iowa guaranteed to the prisoner a speedy trial and "the assistance of counsel for his defense," and as the court acted in obedience to the express mandate of a statute in assigning counsel, and the latter, as an officer of the court, was bound to serve, an obligation arose to pay a reasonable compensation for the service thus rendered, and consequently the county was liable. In the other case, a somewhat similar view was taken, the court remarking that the liability of the county resulted from the exercise of the power and duty of the court to appoint counsel, not because the court was authorized to contract for the county or its officers. In other States it has been decided differently. In *Rowe v. Yuba County*, 17 Cal. 61, Chief Justice FIELD says: "We are clear that the action cannot be maintained. The Court of Quarter Sessions is not authorized to create any charge against the county, except in certain special cases, of which the employment of counsel for parties under indictment is not one. Besides, it is a part of the general duty of counsel to render their professional services to persons accused of crime, who are destitute of means, upon the appointment of the court, when not inconsistent with their obligations to others, and for compensation they must trust to the future ability of the parties. Counsel are not considered at liberty to reject, under circumstances of this character, the cause of the defenseless, because no provision for their compensation is made by law." To the same effect is *Vise v. County of Hamilton*, 19 Ill. 78, in which it is said: "The law confers on licensed attorneys rights and privileges, and with them imposes duties and obligations, which must be reciprocally enjoyed and performed. The plaintiffs but performed an official duty for which no compensation is provided."

While there is some force in the reasoning of the Iowa and Wisconsin courts, we adhere to the opposite view as according better with a practice which has been almost universal and of such long standing as to have acquired the force of law. In this State we have always proceeded on the safe principle of requiring statutory authority, either in express terms or by necessary implication, for all such claims upon the public treasury. To hold that counsel, appointed to defend insolvent prisoners, may demand compensation from the county, would be a departure from a time-honored custom to the contrary, and it is not difficult to foresee the mischief to

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which it would lead. It is far better to let such cases rest on the foundation which has hitherto sustained them: human sympathy and a just sense of professional obligation. No poverty-stricken prisoner is ever likely to suffer for want of necessary professional or pecuniary aid.

It is but simple justice to the learned gentlemen who defend against this writ, to say, that in their brief, as well as orally, they disclaimed any desire for remuneration beyond an amount sufficient to reimburse them for their actual cash outlay; but we find no warrant for sustaining their claim even to this extent.

The judgment of the Common Pleas is reversed and set aside, and judgment is now entered in favor of the defendant and against the plaintiffs below.

NOTE BY THE REPORTER. — This question was considered in *People v. Supervisors*, 35 How. Pr. 22. INGALLS, J., said: "In the case of *People v. Supervisors of Fulton County*, 14 Barb. 58, ALLEN, J., says: 'If services are rendered which are not provided for by the statute, however meritorious, they are gratuitous, and the party is not entitled to compensation.' *People v. Supervisors of New York*, 1 Hill, 368; *People v. Lawrence*, 6 id. 244. In the last case BRONSON, J., says: 'They' (speaking of the board of supervisors) 'have only such powers as have been conferred upon them by the legislature, and there is no statute which gives any color for saying that they could indemnify the relator against the expenses of his defense. And whatever appearance of justice there may be in charging the expenses of the accused upon the county, it is enough for us to say that this consideration addresses itself exclusively to the legislature.' *People v. Van Wyck*, 4 Cow. 280.

"I have not been able to find any statute of this State which under the most liberal construction directs or even authorizes the court to assign counsel to defend prisoners, or that provides any compensation or prescribes any mode of payment for such service. It was insisted upon the argument that such authority was to be found in the Constitution of this State. The seventh article and seventh section of the Constitution provides as follows: 'And in every trial on impeachment or indictment the party accused shall be allowed counsel as in civil actions.' The obvious construction of this provision is that a prisoner may have the assistance of counsel in conducting a defense, not that the court shall provide such counsel at the expense of the county. Courts have uniformly assigned counsel to defend prisoners who had not the ability to procure counsel, and the members of the legal profession have rendered the service without the expectation of pecuniary reward from any source, at least not from the county. So uniform has been this practice that I have been unable to find a case in the reports of this State where such a claim has been asserted. This consideration, however, while it indicates pretty clearly what has been the understanding of the courts and the legal profession in this State upon the subject, should not prevent the recognition and enforcement of such a claim if it is a legal charge against the county. It may be well to examine some of the cases where claims have been enforced by mandamus, with a view of ascertaining upon what principle the courts have proceeded. In the *Matter of Bright v. Supervisors of Chenango County*, 18 Johns. 242, which was an application for a mandamus to compel the supervisors to audit the claim of the relator as clerk of the county of Chenango, for certain books procured by him in which to record deeds, mortgages and other proceedings, the court held that although the statute did not prescribe the manner the clerk was to be compensated, yet as the expenditure was authorized by statute the right to compensation would be implied, and the purchase being for the express benefit of the county, it was chargeable. The court gave controlling effect to the fact that the purchase was authorized by the statute, and the same was for the express bene-

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of the county. In *People ex rel. Hilton v. Supervisors of Albany County*, 13 Wend. 257, the application was for a mandamus to compel the supervisors to audit a claim of the relator for attendance to the clerk's office to witness the drawing of juries for the Common Pleas and mayor's courts. The court directed that the writ issue, basing its decision upon the fact that the statute expressly directed the service. *Mallory v. Supervisors of Cortland County*, 2 Cow. 531, 533; *Doubleday v. Supervisors of Broome County*, id. 533, 534. The principle seems to be established by the decisions of the courts of this State that to charge a county with a claim for services rendered or expenses incurred there must be some statutory authority authorizing the same to be rendered or incurred, or directing the payment thereof, before the board of supervisors can be compelled by mandamus to audit such claim. The counsel for the relator has cited a case decided by the Supreme Court of Iowa, *Hall v. Washington County*, 2 Green, 473. In that case counsel was assigned to defend a prisoner who was unable to procure counsel, and the court held the claim for such service a legal charge against the county under a provision of the Revised Statutes of that State, which is as follows: 'The court shall assign counsel to defend the prisoner in case he cannot procure counsel himself.' WILLIAMS, J., says: 'In this case the right of action in the plaintiff does not arise from an express contract, but it is necessarily given by the statute — the statute authorizes the appointment of counsel in defense of a pauper when accused of crime — in view of the right of that counsel to compensation for the service rendered in obedience to that law, as an incident, necessarily attaches a liability for the services to the county, which is properly chargeable with the maintenance of the proceeding.' The principle decided in that case is in harmony with the decision of the courts of this State, and carries the doctrine no further. The case of *Webb v. Baird*, 6 Ind. 14, was decided by a majority of the court, DAVISON, J., dissenting. From that case it appears that the Constitution of that State provides as follows: 'That no man's particular services shall be demanded without just compensation.' The court by assigning counsel demanded his particular services, and the same were rendered with reference to that provision of the Constitution, and under an expectation of reward, and the court held that the county was liable. I have looked in vain for any constitutional or statutory provision, or decision of the courts of this State, recognising any such claim or from which the right to such compensation can be inferred."

KNECHT V. MUTUAL LIFE INSURANCE COMPANY.

(90 Penn. St. 118.)

Insurance — life — covenant against future pernicious habit.

In an application for a life insurance policy the applicant declared "that he does not now nor will he practice any pernicious habit that obviously tends to the shortening of life." The policy contained a condition "that if any of the statements or declarations made in the application shall be found in any respect untrue, the policy shall be void." At the time of the application applicant's habits were correct and temperate; afterward he took to excessive drinking, whereof he died. *Held*, that the policy was not avoided. (See note, p. 643.)

ACTION on a policy of life insurance. Defense, breach of warranty. The opinion states the facts. The plaintiff had judgment below.

Edward J. Fox, for plaintiff in error.

H. Green, for defendant in error.

PAXSON, J. It is not alleged that in his application for insurance the insured made any false representation of an existing fact. What he did declare was, "that he is not now afflicted with any disease or disorder, and that he does not now, *nor will he*, practice any pernicious habit that obviously tends to the shortening of life." The case stated sets forth, "That at the times of making the aforesaid application for insurance, the said Abram F. Fangboner was of correct and temperate habits; that some years after the issuing of said policy he became addicted to the use of intoxicating drinks from the immoderate use of which he was attacked with delirium tremens, from which he died." The policy issued in pursuance of said application contained this provision: "If any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then and in every such case this policy shall be null and void." It is unnecessary to discuss the question as to whether the declarations of the insured as to existing facts in his application, constitute a warranty. The authorities are by no means uniform upon this point. Our own recent case of *Washington Life Insurance Co. v. Schaible*, 1 W. N. C. 369, holds that they do not constitute such warranty. Where, however, the policy has been issued upon the faith of such representations, and they are false in point of fact, the better opinion seems to be that the policy is avoided. And this is so even where the false statement is to a matter not material to the risk. *Jeffries v. Life Insurance Co.*, 22 Wall. 47. In such case the agreement is that if the statements are false, there is no insurance; no policy is made by the company, and no policy is accepted by the insured. In the case in hand the policy attached. There was nothing to avoid it *ab initio*. Were the mere declarations by the insured in his application, as to his future intentions, and his failure to carry out his declarations or to comply with his intentions as to his future conduct sufficient to work subsequent forfeiture of the policy? In no part of the application did the assured covenant that he would not practice any pernicious habit. Nor did he promise, agree or warrant not to do so. He *declared* that he would not. To declare, is to state; to assert; to publish; to utter; to announce; to announce

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clearly some opinion or resolution; while to promise is to agree; "to pledge one's self; to engage; to assure or make sure; to pledge by contract." — Worcester. There is no clause in the policy which provides that if the assured shall practice any pernicious habit tending to shorten life, the policy shall *ipso facto* become void. There is only the stipulation that, "if any of the statements or declarations made in the application * * * shall be found in any respect untrue, this policy shall be null and void." This evidently referred to a state of things existing at the time the policy was issued. As to such matters, as I have already said, there was no untrue statement. But the assured declared, as a matter of intention, that he *would not* practice any pernicious habit. Was this declaration of future intention false? There is no allegation, much less proof, that it was so. The assured might well have intended to adhere to his declarations in the most perfect good faith, yet in a moment of temptation have been overcome by this insidious enemy. In the absence of any clause in the policy avoiding it in case the assured should practice any such habit, and of any covenant or warranty on his part that he would not do so, we do not think his mere declaration to that effect in the application sufficient to avoid the policy.

The judgment is reversed, and judgment is now entered in favor of the plaintiff and against the defendant for the sum of \$1,500, with interest from June 26, 1876.

Judgment reversed.

TRUNKY, J. dissented.

NOTE BY THE REPORTER.—The contrary was held where the word "guarantee" was used instead of "declare." *Knight v. Mutual Life Ins. Co.*, Pennsylvania Supreme Court, January, 1881. The contrary was also held, when "declare" was used with a warranty covering declarations, in *Schultz v. Mutual Life Ins. Co. of New York*, United States Circuit Court, southern district of New York, March, 1881, SHIPMAN, D. J., 6 Fed. Rep. 672. There was a warranty policy, with this provision: "And the said person whose life is proposed for insurance further declares that he is not now afflicted with any disease or disorder, and that he does not now, nor will he, practice any pernicious habit that obviously tends to shorten life." Also the following: "This policy is issued and accepted by the assured upon the following expressed conditions and agreements: * * * If any of the statements and declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then, and in every such case, this policy shall be null and void." The court said: "The general character and legal effect of a similar clause in a life policy was considered by the Supreme Court in *Jeffries v. Life Ins. Co.*, 28 Wall. 47. The clause in that policy declared that the policy was made by the company upon the express condition and agreement that the statements and declarations made in the application for the policy, and on the faith of which it was issued, were in all respects true. The question before the court was whether the untruth of any statement or declaration made the policy void, or whether the untruth of such

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statements only as were material to the risk had such effect. The court says: 'This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. They need not be representations, even, if this term conveys an idea of an affirmation having any technical character. Statements and declarations is the expression; what the applicant states, and what the applicant declares. Nothing can be more simple. If he makes any statement in the application it must be true. If he makes any declaration in the application it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company.' The policy, then, having been issued upon the express condition that each statement and each declaration shall be found to be true, the only remaining question is whether this language includes declarations in regard to existing alleged facts, or includes also declarations in regard to the future existence of facts which are or are not to take place. I was at first inclined to the opinion that the adjective 'untrue' was inapplicable to express the violation of a promise or agreement in regard to the future; that a declaration that a person would not do a thing could not be said to be untrue although the person did subsequently do the act which he had declared he would avoid. A consideration, however, of the stress which is laid by courts in analogous cases upon language in a policy which implies that a future act material to the risk is to be done or omitted, leads me to a different conclusion. In fire policies the application or survey is made generally a part of the policy. The answers to questions which indicate or declare that in future a certain state of things is to take place and exist in the insured property—as for example, that after a certain time the property will not be used at night, or that a chimney will be built, or the location of a stove will be changed—have frequently been held to be binding upon the assured, and to be a promissory engagement or warranty that the named act would happen or continue to exist; so that in *Bilborough v. Ins Co.*, 5 Duer, 587, the principle is stated as follows: 'Language in a policy which imports that it is intended to do or omit an act which materially affects a risk, its extent, or nature, is to be treated as involving an engagement to do or omit such act.' In this policy such statement and declaration is, in substance, incorporated into and made part of the policy. The language in regard to future pernicious habits is far more than a declaration of intention. It is a positive representation of a future fact, and is not to be regarded as an expression of the expectation or belief of the insured.

"I am, therefore, led to the conclusion that the clause in the policy imports an agreement that future pernicious habits shall not be entered into, and that if the insured thereafter practices any pernicious habit that obviously tends to shorten life, the policy will be thereby avoided. The evidence is admitted."

 LEHIGH VALLEY RAILROAD COMPANY V. MCKEEN.

(90 Penn. St. 123.)

Proximate and remote cause — communication of fire.

A railway locomotive engine emitted sparks to land adjoining the plaintiff's where they ignited leaves, briars, brush, stumps, and logs, and the fire was continuously conducted by the same, in about two hours, to a pile of lumber on the plaintiff's land, three hundred feet distant, which it consumed. The weather was dry, and the wind was high in that direction. There was some evidence of another origin. *Held*, that it was a question of fact whether the defendant's negligence was the proximate cause of injury. (*See note, p. 640.*)

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ACTION for setting on fire and destroying lumber. The facts are sufficiently stated in the syllabus and opinion. The plaintiff had judgment below.

H. Green, for plaintiff in error.

Edward J. Fox and *John L. Wilson*, for defendant in error.

TRUNKY, J. However severe animadversions, sometimes made upon juries, the courts are bound to conserve their rights in the trial of causes. The organic law secures to the people trial by jury, as it was by common law, and nothing is more offensive in the administration of justice than for the judge to usurp the disposition of facts. Where there is no evidence of a disputed fact, or a mere scintilla, the question shall not be submitted; but where there is sufficient evidence to warrant its finding, it must be, and its determination is exclusively for the jury. If a fact, in the opinion of the judge, be proved by clear and uncontradicted oral testimony, he may advise, not command, the jury to find it. They may disbelieve the witnesses, though he credits them, and they may understand the testimony differently from him. When a fact, essential to the maintenance of a cause, is not established by proof, the judge may order a nonsuit, or direct a verdict for defendant; and when the requisite facts are agreed upon, or admitted, he may instruct a finding for plaintiff. These trite principles, called to mind by the line of argument, seem to have been remembered by the learned judge, and they forbid reversal in absence of error in his rulings upon legal questions. If indeed it be true that a prejudice exists affecting jurors in a class of cases, elsewhere it might be profitable to inquire into the causes and of the means for its removal.

The chief complaint in this cause is, "the question of remoteness or proximity was referred as a question of fact to the jury." How it could have been otherwise, without disregarding the authority of *Pennsylvania Railroad Co. v. Hope*, 80 Penn. St. 373; s. c., 21 Am. Rep. 100, is difficult to comprehend. There the fire was dropped on a cross-tie on the track, "and running into a small heap of dry grass that had been cut and pulled and thrown into a pile, in the fall before, was carried thence by means of rubbish and dry grass on the company's ground, across the roadway to the fence, which

was fired, and thence across two fields, burning the dry grass in its pathway, until it reached the plaintiff's fence and woodland, about six hundred feet from the railroad, burning the fence and a large part of the woods. The weather was dry and windy, and the direction of the wind was strongly toward the plaintiff's fields and woods." Here, the sparks were thrown from the engine to a point alongside of the defendant's track, on land adjoining the plaintiff's, about three hundred feet from the lumber, set fire to combustible materials, consisting of leaves, briars, brush, stumps and logs, burning the same in its pathway till it reached the plaintiff's lumber. The weather was dry and a high wind was in the direction of the property destroyed. There, the sparks fell on the track and were communicated to the adjoining land by the dry grass, negligently left by the company on its roadway. Here, the sparks were thrown into the combustibles on the adjoining land. The fire, reaching the combustibles on the land, was as sure to destroy in one case as the other. It was held that the question of proximity was one of fact peculiarly for the jury. "How near or remote each fact is to its next succeeding fact in the concatenation of circumstances from the prime cause to the end of the succession of facts, which is immediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case, and depend upon the evidence. The jury must determine, therefore, whether the facts constitute a continuous succession of events, so linked together, that they become a natural whole, or whether the chain of events is so broken, that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause—the negligence of the defendant. The rule concerning involuntary negligence, as distinguished from wanton or intentional injury, is expressed in the maxim, *causa proxima non remota spectatur*. * * In all or nearly all cases, the rule for determining what is a proximate cause is, that the injury must be the natural and probable consequence of the negligence, and that this might and ought to have been foreseen under the surrounding circumstances. These are the circumstances of the particular case, and from the nature of the thing must be referred to the jury." Per AGNEW, C. J.

The portion of the charge, alleged erroneous in the ninth assignment, immediately preceded the reading of the matter set forth in the fifth assignment, and placed in its proper order in the instruc-

tions to the jury, accords with the doctrine in *Hope's* case, and is nearly in the words there used. To have affirmed defendant's eighth point would have annulled that decision. The facts were not agreed upon nor admitted, and their finding was exclusively for the jury. Had the defendant added to those stated in the point, another fact, namely, that the fire was transmitted by a continuous burning of the leaves and brush, from the point of its origin to the lumber, the natural and probable consequence of defendant's negligence, the jury might properly have been told, that upon such facts, the cause was proximate and plaintiffs could recover. Or instead, had it been added that there was no continuous burning, and the destruction of the lumber was not a natural result of setting fire to the leaves and brush, then upon such facts it could well have been affirmed that the maxim applied, and the verdict must be for defendant. A jury of the vicinage would understand the witnesses, and know quite as well how that fire would run in the dry leaves and brush, on a windy day, as a judge learned in the law. Likely not one would hesitate in believing there was no real break in the fire, from its starting point to the lumber, or that if it got within eighteen or twenty feet of the lumber, the latter would burn. They could also determine whether dry weather and high winds, in the spring-time, are extraordinary; and whether, under these conditions, the continuous succession of events was such that the cause was naturally linked to the injury, and within the probable foresight of him whose negligence ran through from the beginning to the end.

It is contended that *Hoag v. L. S. & M. S. Railroad Co.*, 85 Penn. St. 293; s. c., 27 Am. Rep. 653, in effect overrules the doctrine in *Railroad Co. v. Hope*, and fully sustains and approves the ruling in *Pennsylvania Railroad Co. v. Kerr*, 62 Penn. St. 353; s. c., 1 Am. Rep. 431. The opinion of the late chief justice in *Hope's* case, shows the marked distinction between that and *Kerr's*, and that the latter, upon its own facts, was unshaken. If the case of *Hoag* seems to support the one rather than the other, it is because of the greater similarity of facts.

In *Hoag v. Railroad Co.*, the plaintiffs adduced the evidence upon which they framed their third point, praying instructions that if the jury believed the facts as therein stated, they were entitled to recover. The defendant conceded the facts, and the jury were told that upon the facts in evidence, or as assumed in the

plaintiff's third point, their verdict should be for defendant. Had the facts not been virtually admitted the instruction would have been bald error; and so held this court. PAXSON, J., after referring to, and quoting at some length from *Railroad Co. v. Hope*, without a word of qualification or abatement of its force, says: "But it has never been held that when the facts of a case have been ascertained, the court may not apply the law to the facts. This is done daily upon special verdicts and reserved points. Thus in *Railroad Co. v. Kerr*, 62 Penn. St. 353, a case bearing a striking analogy to this, the court submitted the question of negligence to the jury, but reserved the question of proximate cause upon the undisputed facts of the case. Of course, this could not have been done if the facts were in dispute. A reserved point must be based upon facts admitted in the cause or found by the jury. In questions of negligence it has been repeatedly held that certain facts when established amount to negligence *per se*. * * * We may therefore regard the plaintiff's third point as a prayer for instructions upon the undisputed facts of the case." It thus appears that the authority of *Railroad Co. v. Hope* is in nowise shaken by the decision in a case where the plaintiffs complained that the facts were not submitted which they themselves assumed to be true. Had the opposite party denied that they were a full and fair statement, and the case had come on his complaint, the situation would have been altogether different. Or had the assumed facts been in dispute, and the point refused therefor, neither party could complain.

In that case the ignited oil ran down the bank into the river and was carried down the current, top of the water, till consumed. On its way it set fire to the plaintiff's property. The water bearing it was an intervening agent, as would be the hand bearing a lighted torch. This court stated the rule for determining what is proximate cause, and said: "It would be unreasonable to hold that the engineer of the train could have anticipated the burning of the plaintiff's property as a consequence likely to flow from his negligence in not looking out and seeing the land-slide." "It is manifest that the negligence was the remote and not the proximate cause of burning the plaintiff's building." Not so was it held, where fire was negligently communicated to dry grass and fences, in which the fire spread as it consumed, and was speeded in its progress by a strong wind. In the latter the question of proximity was one of fact for the jury, who must determine whether the injury was the

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natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act. What would be more quickly apprehended, by one setting fire to dry leaves and brush, than that it would run before the wind and consume property in its pathway?

There is no error in the answer to the defendant's fourth point; besides in the general charge, on this matter, the court called attention to the testimony in a manner which ought to be entirely satisfactory.

An examination of the testimony has convinced us that the defendant's tenth and eleventh points were rightly refused. The plaintiff's, if believed, standing alone, would justify a verdict in his favor, and consequently the court was bound to submit the questions of fact to the jury, no matter how strong the defendant's counter proofs. It would be idle to refer to the testimony of each witness in detail.

The third, fourth, sixth and tenth assignments were not pressed, for the declared reason that it is now settled that it is not contributory negligence in the owner to leave combustible material on his land near a railway track. *Philadelphia & Reading Railroad Co. v. Hendrickson*, 80 Penn. St. 182; s. c., 21 Am. Rep. 97.

The numerous points were fairly answered, and the instructions so full that there is no complaint of omission to charge on any question which was raised at the trial.

Judgment affirmed.

NOTE BY THE REPORTER. — In *Kuhn v. Jewett, Receiver*, 33 N. J. Eq. 647, a railway train laden with petroleum was wrecked, owing to the defendant's negligence, and the petroleum escaping took fire, ran into a brook, and was floated against and ignited the plaintiff's barn some distance away. It was held by the vice-chancellor that the defendant was liable. The court said: "There can be no doubt, I think, if in this instance the flames of the burning oil had been carried by the wind directly from the point of collision to the petitioners's building, and it had thus been set on fire and destroyed, that the injury would in judgment of law have been the natural and direct or proximate result of the collision. So, too, if the burning oil had descended from the point where it was first ignited, by the mere force of its own gravity, upon the petitioner's building and destroyed it, the connection between cause and effect would have been so close and direct that the defendant's liability could not have been successfully questioned. So also if the fire had been carried from the place of its origin to the petitioner's building by a train of combustible matter deposited in its track by the operation of the laws of nature, the petitioner's injury, I think it could not have been doubted, would have been esteemed the direct result of the defendant's negligence." Citing *Delaware, etc., R. R. Co. v. Salmon*, 10 Vroom, 308; s. c., 23 Am. Rep. 214. "These principles must rule this case. Their application is obvious. For although water is almost universally used as a means to extinguish fire, and it seems at first blush absurd to say that it can be used for the purpose of extending it, yet it is true, as a matter of fact, that as an agency for the transmission of burning oil, it is just as

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certain and effectual in its operation as the wind in carrying flame, or a spark, or combustible matter in spreading a fire. In keeping up the continuity between cause and effect, it may be just as certain and effectual in its operation as any other material force." The court noticed and disapproved *Hoag v. Lake Shore & Michigan S. R. Co.*, 83 Penn. St. 298; s. c., 37 Am. Rep. 653, a case exactly like the principal case, and also the *Ryan* case, 35 N. Y. 210, and the *Kerr* case, 62 Penn. St. 353; s. c., 1 Am. Rep. 431, as "standing opposed to both precedent and principle."

In *Portsmouth Ins. Co. v. Reynolds*, Virginia Court of Appeals, January, 1880, the action was on a policy of fire insurance. The insured building was consumed by fire communicated from the fire at the navy yard at Norfolk, Va., set by the United States authorities on vacating that post April 17, 1861. The court said: "The proximate cause of the loss was the act of the United States. The fire, originated by that act, was 'continuous.' The force set in motion by the hand that first applied the torch was uninterrupted and unceasingly operative until all the buildings were destroyed, and the cause of the loss of all was the same, not less of the loss of the one last burnt than of the one first fired. In determining in each particular case, whether the alleged cause of a catastrophe is proximate or too remote in a legal view, it is said that one of the most valuable criteria furnished by the authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as to the cause of the misfortune, the other must be considered as too remote. *Ins. Co. v. Tweed*, 7 Wall. 44, 52; *Milwaukee, etc., Railway Co. v. Kellogg*, 94 U. S. 469; *Ins. Co. v. Transportation Co.*, 12 Wall. 190; *Ins. Co. v. Seaver*, 19 Id. 542. Certainly, in this case there was no new independent cause intervening between the alleged cause, the setting fire to the ship-house and the accomplished fact, the destruction of the insured building, sufficient of itself to stand as to the cause of the misfortune which occurred." See *Lee v. Union R. R. Co.*, 12 R. I. 336; s. c., 34 Am. Rep. 668.

In *White v. Colorado Cent. R. Co.*, 5 Dill., 429, it was held that a railroad company, storing goods carried over its line, in a warehouse, till called for, is liable for the destruction of such goods by a fire which the firemen were deterred from extinguishing by the presence of a large quantity of gunpowder stored in the same building by the company. The court said:

"Another objection to the charge is that the powder, if at all instrumental in the destruction of plaintiffs' goods, was not the proximate cause of that result. To support this objection, insurance cases are cited in which it has been held that loss occasioned by explosion of powder may be connected with the fire which ignited the powder as the proximate cause.

"Hence it is claimed that in all such cases, the fire, and not the powder, is the proximate cause of the loss. But there may be, and usually there is, more than one agency or means of producing loss. Take, for instance, the car loaded with oil which escaped from the company's servant and ran down a steep grade and came in collision with a locomotive, which set fire to the oil, and thence it was communicated to the plaintiff's house. The fire and oil united in the destruction of plaintiff's house, and the cause of all the mischief was a defective brake on the car. If there was negligence in respect to any of these things, the person chargeable with such negligence was responsible for the loss. *Oil Creek & Allegheny Railway Co. v. Kelghron*, 74 Penn. St. 816.

"So, also, where dry grass was negligently allowed to remain in heaps near defendants' railway, and fire was communicated to such heaps by a passing engine, and thence carried by the wind a distance of two hundred yards to plaintiff's cottage, which was destroyed, the defendant was held liable. *Smith v. London & Southwestern Railway Co.*, 6 C. P. H. s. c., 5 C. P. 98. The fire was, of course, a cause of mischief, but the wind and dry grass were also efficient in communicating the fire to the building, and the negligence was in respect to the grass only. If defendant had set the grass on fire negligently, or (if that had been possible), had caused the wind to blow, it would have been liable for the loss in the same manner."

"On the same principle, it was held in Massachusetts that one who negligently cut the hose with which water was supplied for suppressing a fire, was liable for the damage occasioned by his wrongful act. *Metallic Compressing Co. v. Fitchburg Railroad Co.*, 25 Mass. 578; s. c., 13 Am. Rep. 689.

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"There, as in the case at bar, it was contended that the proximate cause of loss was the fire, rather than the oil of the defendant. But the court was of a different opinion, saying that when a man cuts off the hose through which firemen are throwing a stream on a burning building, and thereupon the building is consumed for the want of water to extinguish it, his act is to be regarded as the direct and efficient cause of the injury.

"In all these cases it may be said that the fire is a proximate cause of loss, but it does not follow that it is the only cause standing in that relation to the result. And so, while it is true that plaintiff's goods were in fact destroyed by fire, it is also true that the gunpowder in the warehouse, by keeping the workmen from the fire, may have contributed to the loss in such way as will make it a proximate cause. Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause."

"Without further discussion of what appears to be plain, we have no doubt that the powder was near enough to the loss to make the defendant liable for its negligence in putting it in the warehouse, if, as the jury have found, it directly contributed to the result."

BRENEMAN V. FURNISS.

(90 Penn. St. 186.)

Negotiable instruments — evidence — contemporary agreement that indorser should not be liable.

In an action by holder against indorser of a check, evidence is competent, not only that the defendant indorsed upon the express agreement of the holder that he should not be liable, but of all the circumstances under which the indorsement was made, and that it was at the request and for the mere accommodation of the holder.*

ACTION by holder against indorser of check. The defendant offered to prove that at the time this check was made, the plaintiff was county treasurer, and was working to procure the election of Stephen Grissinger as his successor, under an agreement that plaintiff should be his deputy; that he desired to get the vote of Providence township, through the influence of H. S. Kendig, the maker of the check; that to this end plaintiff proposed to give Kendig the opportunity of making \$50, by furnishing him the means of anticipating the payment of the taxes of Providence township, and thus getting the five per cent reduction from the commissioners of the county; that with this view he proposed to defendant to make the arrangement with Kendig under which this check was given; that this check was given for that purpose with the understanding that the defendant should incur no liability thereon under any circumstances.

*To same effect, *Taylor v. French* (3 Lea, 257), 81 Am. Rep. 609.

The court refused to allow defendant to ask a witness "What was the check given for?" And also refused to allow defendant to prove what the check was given for, and what was said by the parties at the time the check was given, and afterward as to defendant's liability.

The defendant also offered to prove that witness told Furniss that he could get Kendig to work for Grissinger as he had done in other cases, with other tax collectors, by allowing him to make five per cent on outstanding taxes. Furniss agreed, and thought that Kendig's securities were good. That the parties met at county house and got up the check on Furniss' suggestion to have it prepared in this way. That Furniss told witness that it would not do to have it drawn up in his own name, but it must be in some one else's name. Breneman was asked and agreed to do it, with the understanding that he should not be liable on it, and that the check was not to go to bank. The check was then prepared and passed over to Furniss.

The court refused to allow defendant to ask witness, "Why was Mr. Breneman's name to be put into the check?"

Also, to ask, "Did or did not Mr. Furniss propose that Mr. Breneman's name was to be put into this check, and if so, why?"

The court allowed none of the above except proof of the bare fact that the check was indorsed with the understanding that defendant should incur no liability. The plaintiff had judgment below.

B. Frank Eshleman and D. G. Eshleman, for plaintiff in error.

J. W. Johnson and George M. Kline, for defendant in error.

STERRETT, J. The defendant in the court below contended that he permitted the use of his name as payee and indorsed the check in suit, at the request of and as a matter of accommodation to the plaintiff, not only without consideration, but upon the express promise and agreement that he should incur no liability by reason of his indorsement. It was competent, as between the immediate parties to the transaction, to prove these allegations. An attempt on the part of the plaintiff to enforce payment of the check under these circumstances was making such an improper use of it as would justify proof of the agreement under which it is alleged the indorsement was procured. *Hill v. Fly*, 5 S. & R. 363; *Ross v. Espy*, 16 P. F. Smith, 481.

Breneman v. Furness.

The defendant offered to prove the facts above stated, together with the circumstances connected therewith, as explanatory of the transaction. The court permitted him to prove the naked fact that the "check was given with the understanding that he should incur no liability thereon," but studiously excluded all testimony tending to show the circumstances under which he permitted the use of his name as payee and became indorser of the check, or the purpose for which it was done. In this we think there was error. The result was that there was little or no testimony before the jury to explain why the plaintiff should request him to indorse the check, and at the same time agree that under no circumstances should he incur any liability by virtue of his indorsement. Within the narrow limits thus prescribed by the ruling complained of, some testimony as to the isolated fact of the agreement, was introduced, upon the strength of which the court was requested to charge the jury that if they believed, "the plaintiff had agreed with the defendant that he should incur no liability by reason of his indorsement of the check in suit, their verdict must be for the defendant." This point was affirmed, and thus the question of fact, vital to the defense, was presented and submitted to the jury; but it was found adversely to the defendant. If proof of the circumstances directly connected with and leading to the alleged agreement, and explanatory thereof, had been admitted, it would have tended, in some degree at least, to corroborate the defendant, and might have satisfied the jury that his version of the affair was the true one. The case was one in which a knowledge of the *res gestæ* might very materially aid the jury in reaching a correct conclusion. What was confidently asserted on the witness-stand by the one party, in regard to the agreement on the faith of which the check was indorsed, was just as positively denied by the other; and in searching for the truth, the jury needed all the light that could be shed on the transaction by the circumstances immediately connected therewith. For this purpose alone we think the testimony referred to in the fourth to eighth assignments of error, both inclusive, should have been received.

There is nothing in either of the remaining assignments that calls for special notice.

Judgment reversed, and a *venire facias de novo* awarded.

Judgment reversed.

CROYLE V. MOSES.

(90 Penn. St. 250.)

Fraud — sale — artifice — evasive answer.

Where on the sale of a horse known by seller to be unsound in a certain respect the seller conceals the defect, and gives evasive and artful answers to inquiries, with the intent to deceive, and thereby deceives and injures the purchaser, the latter may rescind.*

ACTION of damages for fraud in the sale of a horse. The opinion states the point. The defendant had judgment below.

King and Cessna & Cessna, for plaintiff in error.

J. M. Reynolds and Russell & Longenecker, for defendant in error.

MERCUR, J. This is an action on the case to recover damages for the fraudulent sale of a horse. The declaration contains two counts. One charging a fraudulent warranty, the other, deceit and fraudulent representations. Two distinct questions are thus presented; the one, whether the defendant warranted the horse to be sound; the other, whether without any warranty he fraudulently and deceitfully practiced some trick or artifice in making the sale, whereby the plaintiff was deceived and injured.

As bearing in some degree on the first count, we cannot convict the court of error in admitting the evidence covered by the first and second assignments. The third assignment covers the answer of the court to the fifth, sixth and seventh points submitted by the plaintiff. No one of these points presents the question of a warranty against the defect complained of, but all of them are based on deceitful, fraudulent and artful statements and representations. Each of them in different language substantially requested the court to charge the jury that the defendant was liable in case he with intent to deceive the plaintiff answered him artfully, so as to mislead him to his injury.

* To same effect *Kenner v. Harding* (85 Ill. 304), 28 Am. Rep. 615.

The learned judge answered all these points together, and appears to have overlooked the distinction between warranty and deceitful representations. As was said in *Krumbharr v. Birch*, 2 Norris, 426: "It needs no citation of authorities to prove that the willful misrepresentation or concealment of a material fact by the vendor constitutes a fraud." But fraudulent representations may be as well by arts or artifices calculated to deceive, as by positive assertions. 2 Kent's Com. *483; 1 Story's Eq., § 192; Brightly's Eq., § 55; *Cornelius v. Molloy*, 7 Barr. 293.

Although no answer to the points, yet in the absence of artifice or deceitful representations, the jury was correctly told "the defendant was not bound to inform the plaintiff that the horse was a cribber. He had a right to remain silent and let the purchaser examine for himself and buy on his own judgment." The jury was also correctly instructed that "a seller has no right, by words or acts, to mislead a buyer and prevent an examination or inquiry." The error was committed in the next sentence, which declared: "But a mere evasive answer is not of itself equivalent to a warranty." This is undoubtedly true, but is no answer to the points. The request was not for instructions as to what constituted a warranty or what answers were equivalent to a warranty, but as to the effect of fraudulent acts and declarations in the absence of a warranty. The court again interwove the warranty saying: "The seller may keep the horse's defects to himself, if he does not warrant nor make false representations nor fraudulent concealment, and the buyer has an opportunity to inspect and test the horse, and buys on his own judgment. The mere short hitching of the horse to a fence, accompanied by the defendant's statement that he thus hitched him to keep him from rubbing the saddle, would not of itself be a false representation, equivalent to a warranty, if the buyer bought on his own judgment, and after an express refusal on the part of the defendant to warrant the horse." Thus the prominent thought expressed in the answer of the court relates to a warranty, while no such question was presented in the points. They called for no instructions that any "false representations were equivalent to a warranty;" nor that "the mere short hitching of the horse," and the defendant's statement relating thereto, were of themselves equivalent to a warranty. The question presented by the points was substantially, if at the time of the sale the horse was known to the defendant to be "a cribber or wind-sucker," and

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this fact was artfully concealed by him to the injury of the plaintiff, whether it was such a concealment of a latent defect as would avoid the contract. The points submitted did not rest on the mere facts that the horse was hitched short and the reason assigned therefor, but also on the additional facts that the defendant knew him to be a crib-biter, and resorted to this artifice to conceal it, and gave an untruthful reason to mislead and deceive the plaintiff. The complaint is not for a refusal or omission to answer, but for an evasive and artful answer. That the horse was actually a crib-biter, and so known to the defendant, was clearly proved. Whether that defect made him unsound was fairly submitted to the jury, under the evidence. That it lessened his market value seems to admit of no doubt. If the jury should believe, as the plaintiff testified, that he said to the defendant, "If there is any thing wrong with the horse, I do not want him at any price," and that the defendant, with knowledge he was a crib-biter, answered the plaintiff artfully and evasively, with intent to deceive him, and did thereby deceive him to his injury, it was such a fraud on the plaintiff as would justify him in rescinding the contract. The answer of the court, blending warranty with fraudulent artifices, failed to present the latter to the mind of the jury in a proper manner. The answer was calculated to mislead them as to the law applicable to that branch of the case. *Relf v. Rapp*, 3 W. & S. 21; *Wenger v. Barnhart*, 5 P. F. Smith, 300; *Gregg Township v. Jamison*, id. 468; *Stall v. Meek*, 20 id. 181.

Judgment reversed and a *venire facias de novo* awarded.

Judgment reversed.

McCLURE V. WATERTOWN FIRE INSURANCE COMPANY OF NEW YORK.

(90 Penn. St. 277.)

Insurance — fire — vacancy — removal of tenant — good faith.

A fire policy was conditioned to be void if the premises should become vacant or cease to be occupied. The proofs of loss showed a vacancy by the tenant a few days before loss. *Held*, that evidence that the vacancy occurred without the knowledge of the insured, and that on learning it he at once endeavored to procure another tenant, and notified the company, is immaterial.*

* See *Cook v. Continental Ins. Co.*, *ante*, p. 488.

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ACTION on a fire policy. The opinion shows the facts. The defendant had judgment below.

W. Trickett, J. A. C. McCune and W. F. Sadler, for plaintiff in error.

S. Hepburn, Jr., and S. Hepburn, for defendant in error.

GORDON, J. William H. McClure, the plaintiff below, accepted the policy which is the subject of the present contention, subject to the express condition that it should be null and void, "if, without the written consent of the company first had and obtained, the dwelling-house or houses hereby insured become vacant by the removal of the owner or occupant, or cease to be occupied in the usual and ordinary manner that dwelling-houses are occupied." This provision became part of the contract of insurance; the company agreed to insure the premises at a certain rate, and the plaintiff in consideration thereof, on his part agreed, that the property should be occupied either by himself or his tenants during the running of the policy, and if at any time it became vacant, then and in that case this policy should be of no further force or effect.

As this condition is unambiguous and reasonable, and as the plaintiff voluntarily accepted it, *prima facie* it would seem to be obligatory. What reason then has the plaintiff to give why it should not be so? The property certainly became vacant without the assent of the company first being had and obtained, and during that vacancy it was burned.

Now, in the case of the *Birmingham Fire Insurance Company v. Kroegher*, 83 Penn. St. 64; s. c., 24 Am. Rep. 147, this court held, that a provision, in the policy, providing against the use of carbon oil in and about the insured building, was good and binding upon the insured, and this notwithstanding the knowledge of the company's agent at the time of insurance, that carbon oil was kept upon the premises. It is therefore certain that provisions, of the character of that now under discussion, are obligatory, and that their violation will avoid a policy of insurance. It will be observed that the case cited and the one in hand are similar, excepting only the objects embraced by the conditions. In the one case, there was a prohibition of the use of carbon oil upon the premises, in the other, a prohibition of the vacancy of the insured building; but on

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both, confessedly, the non-observance of the conditions increased the risk. Why then, should the ruling of the one not apply to the other?

It is urged that the plaintiff's tenant left the premises without his knowledge and consent, and that as soon as he discovered that fact he endeavored to procure a new one. All this may be admitted as true, but then who was to bear the risk in the meantime? Not the company, for it had expressly provided that it would assume no such risk. What then mattered the good intention of the plaintiff? The fact remained that the loss occurred during the vacancy of the property. Had McClure taken the pains to have notified the company of the vacation of the building, and obtained its assent thereto, he would have saved his policy; he did not choose so to do, and hence relieved the defendant of its responsibility. It but comes to this, the plaintiff did not live up to his contract, and so lost the advantages of it.

It is true, as is said in the *Western Insurance Co. v. Cropper*, 8 Casey, 351, that the stipulations in a policy are intended for the benefit of the underwriters, and where they are obscure, they must be interpreted most favorably to the assured; but on the other hand, to refuse their enforcement when they are not obscure, would be a denial of justice. Then again, it is not quite correct to say that such stipulations operate wholly to the advantage of the underwriters, since in consequence thereof the assured obtains his policy at lower rates than would be the case were that policy unconditional.

Our attention has been directed to the case of *Garnwell v. Merchants' and Farmers' Mutual Fire Ins. Co.*, 12 Cush. 167; but it is not in point. The defense there was, not upon any condition in the policy, but upon an alleged increase of risk, occasioned by the vacation of the insured building, and also upon the further allegation that the loss occurred through the culpable negligence of the assured. These were of course questions for a jury, and involved, among other things, the good faith of the plaintiff in his alleged endeavors to procure a new tenant as soon as possible after the vacancy had occurred. Such however is not the question which we have now to consider; it is not whether the risk was increased, or whether the plaintiff acted in good faith, but whether he complied with the condition which he had adopted by accepting the policy.

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The ruling of the court below is supported by the case of *Harri-son v. City Insurance Co.*, 9 Allen, 231, in which it was held that where the policy contained a condition similar to that now under consideration, the company was relieved from responsibility where the loss occurred during the vacancy of the insured premises. Substantially the same ruling may be found in *Keith v. Quincy Fire Insurance Co.*, 10 Allen, 228, and in *Corrigan v. Connecticut Fire Insurance Co.*, 122 Mass. 298. The conclusion at which the court below arrived, being thus abundantly supported by reason and authority, must be affirmed.

Judgment affirmed.

PENNSYLVANIA CANAL COMPANY V. BURD.

(30 Penn. St. 381.)

Negligence — canal company — character of liability.

A company owning and operating a canal is not bound as a common carrier or insurer for the safely navigable state of the canal, but only for the exercise of reasonable care.*

ACTION of damages for injury to a canal boat by an obstruction in the canal. The point is stated in the third paragraph of the opinion. The plaintiff had judgment below.

Francis Jordan and C. J. T. McIntire, for plaintiffs in error.

J. C. McCallister and W. A. Sponsler, for defendant in error.

STERRETT, J. In its relation to the defendant in error, the Pennsylvania Canal Company was neither a common carrier nor an insurer, nor liable as such. As owner and operator of a public water highway, formerly owned by the State, it was bound to so maintain and manage the canal that it could be used with reasonable safety and convenience by the public, for whose benefit it was constructed. To this end the duty of the company to the public demanded the exercise of reasonable and ordinary care; and it is by this standard its liability to the plaintiff below must be measured.

It follows from this that the company is not liable for injuries arising from unforeseen and unexpected contingencies, such as

*See *City of Petersburg v. Applegarth* (38 Gratt. 381), 35 Am. Rep. 337.

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great freshets and tempests, or other events, which, in the exercise of reasonable and ordinary care, would not be anticipated, or could not be provided against. An injury resulting from an unknown obstruction, which could not be guarded against, without the exercise of extraordinary or unreasonable care, must be considered an accident for which no one is specially to blame, and for which the company is not liable. It would be unreasonable to require a canal company to sound and drag the whole length of its canal continually, to ascertain what obstructions might lie at the bottom, or to keep guards along the banks, to prevent the commission of injuries by careless or designing persons. But it is bound, annually at least, when the water is out of the canal, to inspect the bed and remove obstructions. *Exchange Ins. Co. v. Delaware Canal Co.*, 10 Bosw. 180.

As the basis of his claim, the plaintiff below charged that the company was guilty of negligence in permitting a sunken log to lie in the bottom of the canal, on which his boat settled and was destroyed. It may be conceded, that if the company knew, or by exercising reasonable care and diligence might have known, that the obstruction existed, and neglected to remove it, a clear case of liability would be presented; but it is claimed that there was no evidence of either knowledge or culpable ignorance on the part of the company, and that the learned judge erred, not only in submitting the question of negligence to the jury, on wholly insufficient testimony, but in suggesting a state of facts not arising out of the evidence, and thereby gave the jury an unwarrantable license to speculate as to how the log came there, and to infer therefrom that the company knew, or should have been aware, of its presence, as a dangerous obstruction to navigation.

An examination of the testimony before us fails to disclose any evidence upon which the jury could reasonably and properly conclude there was negligence. In the concluding part of his charge, the learned judge says, "There is no evidence that the company had any knowledge of this log being there until the water was drawn off, in May 1876, and Burd's boat was sunk. The case thus stands on very narrow ground, * * * and you must, in order to find for the plaintiff, be satisfied that the persons whose duty it was to inspect the canal in the spring of 1876 did not perform that duty in a careful manner, and overlooked the log if it was then visible in this deep part of the canal. These inspecting parties say it

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was not visible then, and we have said, if it was not, or if there and invisible, the plaintiff cannot recover; and if it floated from Henlock creek, waterlogged and unseen after the navigation opened, in the spring of 1876, the company is not liable." While the question of knowledge on the part of the company is thus practically set at rest, for want of evidence thereof, the jury could not fail to understand that it was still incumbent on them to inquire whether the duty of inspection was carelessly or negligently performed. We discover nothing in the testimony to justify the court in submitting this question to the jury.

While refusal to enter judgment of nonsuit is not assignable for error, it may not be amiss to say that the court would have been justified in entertaining the motion. Viewing the testimony in the most favorable light, it was manifestly insufficient to sustain the allegation of negligence on which his claim is founded; in other words, there was no evidence from which the jury might reasonably and properly conclude there was negligence.

In that part of the charge, covered by the fourth assignment, the learned judge said to the jury, that if plaintiff's "boat was sunk in settling on a log, there would be a *prima facie* case of negligence made out against the company, because a log, unlike a stone, would float along before it would sink, and if a floating log escaped the attention of the company for any considerable time, long enough, say, to become waterlogged and sink, the fact of negligence could hardly be denied." * * * "In determining this question should it be found by you that this log floated on the surface of the canal at any point, and was not taken out, but permitted to float until it sank, then it would be negligence in the company, and the plaintiff should recover the value of his boat."

If there had been any testimony to prove such a state of facts as is here suggested to the jury, the principles of law applicable to them would perhaps not be disputed, but the vice of this portion of the charge, as well as the answers complained of in the second and third assignments, is that there is no testimony tending to prove where the log came from, or that it "floated on the surface of the canal at any point, and was not taken out, but permitted to sink," etc. The suggestion of these as possible or probable facts, was wholly unwarranted by the testimony, and could only tend to lead the jury into a field of vague speculation, resulting in a verdict unsupported by the evidence.

Judgment reversed.

BOWER V. FENN.

(90 Penn. St. 359.)

Sale — representation of value — when a warranty.

In a sale of a drug establishment, if the purchaser has no knowledge of the business and relies on the seller's statement as to the value, and the seller knows of such reliance, and those statements are false, to the purchaser's injury, although the seller believed them true, the purchaser may be relieved.*

EJECTMENT on a mortgage given for the purchase-price of the stock, lease and fixtures of a drug store. The purchaser had no knowledge of the business or property. The seller represented the stock and fixtures as worth \$9,000 and at first asked \$12,500 for the whole establishment, but finally abated \$2,000. The purchaser relied on this representation, and no inventory was taken, the seller objecting to it on the ground that he did not want his clerks and customers to know of the sale, and because of the time and trouble it would involve. The whole establishment was afterwards sold at sheriff's sale for \$2,000. The jury made an abatement to the defendant. The opinion states the instructions. The plaintiff appealed.

H. M. Graydon, for plaintiff in error.

Fleming & McCarrell, for defendants in error.

GORDON, J. The only assignment of error that has particularly drawn our attention in this case, is that embracing the answer to the plaintiff's fifth point. Complaint is made that the answer is not responsive to the point, and this, we think, is well founded. It only remains for us to consider whether the plaintiff was entitled to an affirmative answer, for if not, if it might have been negatived or refused, then he has nothing of which to complain. The point is as follows: "Even if the jury should believe that Fenn relied upon the statements as to the value of the stock, made by the plaintiff, yet if they were made in good faith, and constituted the latter's real opinion as to such value, though the estimate might

*Compare *Grafenstein v. Epstein* (23 Kans. 443), 23 Am. Rep. 371.

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have been too high, it will be no ground of defense in this action, especially as the defendant had full opportunity to verify the statements, and might have declined the purchase unless an inventory was taken."

It will be observed that this point is put upon the ground that Fenn relied upon the statements concerning the value of the property, made by Bower, and consequently, that he dealt upon the faith of those representations. This of course means that Fenn was induced to depend upon Bower's knowledge of the stock, and to trust to that knowledge rather than to information which he might have acquired by an inventory, or by other means. This statement of the question, however, settles the controversy adversely to the point put, for if as the jury have found, the statements, made by the plaintiff, of the value of the property, were false in fact, his belief that they were true was of no consequence; for because of such belief they were none the less false, neither was Fenn the less deceived thereby. If Bower chose to permit Fenn to contract with him, on the faith of his statements of value, he was bound not merely to believe, but to know, that they were true. This very point is ruled in the case of *Fisher v. Worrall*, 5 W. & S. 478, wherein it was held, that a misrepresentation by a vendor of an occult quality in land, though it may have been made in ignorance of the truth, and although the vendee agreed to run the risk of this, was in an action for the recovery of the purchase-money a decisive objection to the plaintiff's recovery. Here, as in the case in hand, the contract resulted from the plaintiff's representations, which in the end turned out not to be true; without these, the contract never would have been made; hence, without regard to his belief, the plaintiff was responsible for their verity. The best indeed that can be said for Bower is, that he asserted for truth what he did not know to be so, but this, as is ruled in the case above cited, is equivalent to the assertion of a known falsehood.

Weist v. Grant, 21 P. F. Smith, 95, and *Watts v. Cummins*, 9 id. 85, have been cited in support of the point under consideration, but in both these cases *Fisher v. Worrall* is recognized as authority, and the cases are so clearly distinguished, by Mr. Justice AGNEW, who delivered the opinions in the two first named, that it is unnecessary for us to attempt a re-discussion of the subject.

[Omitting a minor point.]

Judgment affirmed.

HAMAKER v. BLANCHARD.

(90 Penn. St. 377.)

Lost property — right of finder.

A servant in a hotel found a roll of bank notes in the public parlor, and informed her master, who suggested that it belonged to a transient guest, and received the money from her to give to him. It proved not to belong to the guest, and the servant demanded it from the master, who refused to return it. *Held*, that she could recover it from him.*

ASSUMPSIT. Sophia Blanchard was a domestic in a hotel, of which the defendant was the proprietor. While thus employed, she found in the public parlor three twenty-dollar bills. On finding the money she informed defendant, and upon his remarking that he thought it belonged to a certain transient guest, she gave it to him for the purpose of returning it to the guest. It proved that the money did not belong to the guest, and no claim was made for it by anyone. Sophia afterward demanded it of defendant, who refused to deliver it to her. The plaintiff had judgment below.

H. J. Culbertson, for plaintiff in error. — An innkeeper is liable for the goods of his guest, including money, and if they are brought within the inn a responsibility is created. *Houser v. Tully*, 12 P. F. Smith, 92; *Packard v. Northcraft's Administrators*, 2 Metc. (Ky.) 439; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Edwards on Bailm.* (2d ed.), § 459; *Story on Bailm.*, § 417; *Jones on Bailm.* 95; 1 *Add. on Torts* (Wood's ed.), 755, 752.

J. A. McKee, for defendants in error.

TRUNKEY, J. It seems to be settled law that the finder of lost property has a valid claim to the same against all the world, except the true owner, and generally that the place in which it is found creates no exception to this rule. But property is not lost, in the sense of the rule, if it was intentionally laid on a table, counter or other place, by the owner, who forgot to take it away, and in such case the proprietor of the premises is entitled to retain the custody. Whenever the surroundings evidence that the article was deposited

*See *Bowen v. Sullivan* (68 Ind. 281), 30 Am. Rep. 172, and note, 129.

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in its place, the finder has no right of possession against the owner of the building. *McAvoy v. Medina*, 11 Allen (Mass.), 548. An article casually dropped is within the rule. Where one went into a shop, and as he was leaving picked up a parcel of bank notes, which was lying on the floor, and immediately showed them to the shopman, it was held that the facts did not warrant the supposition that the notes had been deposited there intentionally, they being manifestly lost by some one, and there was no circumstance in the case to take it out of the general rule of law, that the finder of a lost article is entitled to it as against all persons, except the real owner. *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. 424.

The decision in *Mathews v. Harsell*, 1 E. D. Smith, 393, is not in conflict with the principle, nor is it an exception. Mrs. Mathews, a domestic in the house of Mrs. Barmore, found some Texas notes, which she handed to her mistress, to keep for her. Mrs. Barmore afterward intrusted the notes to Harsell, for the purpose of ascertaining their value, informing him that she was acting for her servant, for whom she held the notes. Harsell sold them, and appropriated the proceeds; whereupon Mrs. Mathews sued him and recovered their value, with interest from date of sale. Such is that case. True, WOODRUFF, J., says: "I am by no means prepared to hold that a house-servant who finds lost jewels, money or chattels, in the house of his or her employer, acquires any title even to retain possession against the will of the employer. It will tend much more to promote honesty and justice to require servants in such cases to deliver the property so found to the employer, for the benefit of the true owner." To that remark, foreign to the case as understood by himself, he added the antidote, "And yet the Court of Queen's Bench in England have recently decided that the place in which a lost article is found does not form the ground of any exception to the general rule of law, that the finder is entitled to it against all persons, except the owner." His views of what will promote honesty and justice are entitled to respect, yet many may think Mrs. Barmore's method of treating servants far superior.

The assignments of error are to so much of the charge as instructed the jury, that if they found the money in question was lost, the defendant had no right to retain it because found in his hotel, the circumstances raising no presumption that it was lost by a guest, and their verdict ought to be for the plaintiff. That the money was not voluntarily placed where it was found, but acci-

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dentally lost, is settled by the verdict. It is admitted that it was found in the parlor, a public place open to all. There is nothing to indicate whether it was lost by a guest or a boarder, or one who had called with or without business. The pretense that it was the property of a guest, to whom the defendant would be liable, is not founded on an act or circumstance in evidence.

Many authorities were cited in argument, touching the rights, duties and responsibilities of an innkeeper in relation to his guests; these are so well settled as to be uncontroverted. In respect to other persons than guests, an innkeeper is as another man. When money is found in his house, on the floor of a room common to all classes of persons, no presumption of ownership arises; the case is like the finding upon the floor of a shop. The research of counsel failed to discover authority that an innkeeper shall have an article which another finds in a public room of his house, where there is no circumstance pointing to its loss by a guest. In such case the general rule should prevail. If the finder be an honest woman, who immediately informs her employer, and gives him the article on his false pretense that he knows the owner and will restore it, she is entitled to have it back and hold it till the owner comes. A rule of law ought to apply to all alike. Persons employed in inns will be encouraged to fidelity by protecting them in equality of rights with others. The learned judge was right in his instructions to the jury.

Judgment affirmed.

MERCUR, J., dissents.

CROZIER'S APPEAL.

(90 Penn. St. 384.)

Widow — election under husband's will — personal right — insanity.

The statutory right of a widow to elect not to take under her husband's will must be exercised by her personally in her life, and although she was prevented by insanity from making election, yet the right cannot be exercised after her death by her representatives.*

PETITION by the administrators of Mary Oles, deceased, to be allowed to elect not to accept the provisions of her husband's

*Compare *Wright v. West* (2 Lea, 78), 31 Am. Rep. 583.

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will for her. The opinion states the facts. The petition was dismissed below. In the Orphans' Court, JENKIN, C. J., delivered the following opinion :

"The first question is, have the heirs and next of kin of Mary Oles the right, either for her or themselves, to waive the provisions of her husband's will and elect to take a distributive share of his estate under the statutes ? The right claimed is of first impression in this State; no reported case of similar claim is found in Pennsylvania, and many widows must have died within the year, without having made an election.

"The Statute of Wills, 8th April, 1833, § 11, pl. 12 (Br. Purd. 1476), makes a devise or bequest by a husband to his wife a bar of her dower, unless the will declares otherwise, but provides that nothing therein contained shall deprive the widow of her choice, either of dower or of the estate or property so devised or bequeathed; and the act of 11th April, 1848, construing this section, admits her to a share of the personal estate of her husband under the intestate laws as well as his real, where she waives the provisions of the will, and repeats that the said widow may take her choice, and the act of 29th March, 1832, provides, that at any time after twelve months from the death of the testator, the Orphans' Court, on the application of any person interested in the estate of the decedent, shall issue a citation to any such widow to appear, etc., and make her election, etc., and if she neglects or refuses to appear, such neglect or refusal shall be deemed an acceptance of the devise or bequest, and a bar of dower.

"Dower at the common law, was a provision for a widow out of the lands or tenements of her husband, for support and the nurture of her children, and were it not for the statute giving her a share of her personal estate, there could be no controversy in this case; she had all the income of the real estate of her deceased husband while she lived.

"Now the statute (act of 11th April, 1848), which admits her to a share of his personal estate, only does so 'in case she elects not to take under the last will and testament of her husband.' The right of election is personal to her; it is not given to her heir or administrator. Her title comes by election; 'it is the election that hath obtained it.' There are no inheritable qualities in this right of election vested in the widow; it dies with her. It must have been known to the law-maker that widows often die within a year, or

even within a few days after the decease of their husbands, and had it been intended that this right of election should continue after the death of a widow, it would have been easy to have said so. The intent of the law being to favor, comfort and provide for her, when she died there was no more need. If she died without electing, no choice was necessary, there would be no purpose to subserve. When a right grows out of an election, it cannot arise or come into existence until an election is actually made. *U. S. v. Grundy*, 3 Cr. 337.

“There is some authority on this point in other States. In Missouri, we have *Welch v. Anderson*, 28 Mo. 293, under a statute substantially like our own (R. Code, 1845, p. 430); it was held that the right of a widow was strictly personal and not transmissible by descent; and in *Hamilton v. O'Neil*, 9 Mo. 11, the same principle was held. In the former case the widow died without having made an election and her heirs sought to make it, as heirs, but Scott, J., said there was no right or estate in her capable of descending to her heir. In *Sherman v. Newton's Ex'r*, 6 Gray, 307, under a statute which declares, ‘When any man shall die, having lawfully disposed of his estate by his will, and leaving a widow, the widow may, at any time within six months after the probate of the will, waive the provision made for her in the will, and she shall in such case be entitled to such portion of the real and personal estate as she would have been entitled to if her husband had died intestate,’ it was held in that case that although the widow had died within seven days after her husband, and before the probate of the will, and her heirs had made the application within six months, that the right of election must be exercised personally by the widow, and that the statute did not contemplate any advantage should be derived by the heirs from the privilege; and accordingly there was no provision or direction as to the time or manner in which, in any contingency, they should be allowed to avail themselves of it. To the same effect is *Pinkerton's Adm'r v. Sargent's Ex'r*, 102 Mass. 568, under the same statute, but with these additional features, namely, that the widow had long been a lunatic, and confined in a hospital, and her right of election had been exercised by her guardian, as well as by herself, and the decision rests upon the ground that the privilege is so rigidly personal, that no one could exercise it for her, and being insane, she could not intelligently do so for herself. Then there is *Atherton v. Corliss*, 101 Mass. 44, to same

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effect; and also, *Merrill's Adm'r v. Emery's Ex'r*, 10 Pick, 507; *Boone's Rep. v. Boone*, 3 Harr. & McH. 95; *Collins, Adm'r v. Carman's Ex'r*, 5 Md. 504, all coming to the same result, namely, that the right is personal to the widow. On both reason and authority, it seems clear that the claimants in this case are not clothed with the personal privileges of their relative, Mary Oles, and cannot be permitted to exercise the right of election, and decline the provisions of her husband's will.

" But the jury in the Common Pleas have found that Mary Oles was incapable of exercising her privilege of election for want of mental capacity, and how is the case affected by this fact? It is not to be doubted, in this State, under the authority of *Kennedy v. Johnston*, 65 Penn. St. 451; s. c., 3 Am. Rep. 650, that whilst the court hold that the right is personal to the widow, yet if she be incompetent to exercise it, it is not lost, nor shall it fail her, but the Court of Common Pleas will advise with her committee, elect for her, and then record the election in the Orphans' Court. But where she dies before such election is made, how then? Is the case changed so that the same reasons which exclude the heir from exercising the right after the widow's decease, will not also exclude a court from doing the same thing? Is there a survivorship of the right in the one any more than in the other? Clearly not. The argument which excludes the heir is, that the right of election does not survive the life of the elector. So long as the lunatic elector lives, the court, as guardian, is invested with the power of choice; but when the fountain dries up in death, all that has life in it dies also. In short, if no election is made by the widow during life, when she is competent to act for herself, or by the court when she is not, the right is defeated in either case, the time and opportunity are past, and it never was intended that any election should be made after her death. It could do her no good, and the good of others was not in the view of the law-maker. That the law has been so understood and practiced without challenge for the last century is apparent, from the fact, that a similar claim has never been made with sufficient zeal to establish a precedent."

Louis E. Atkinson and Ezra D. Parks, for appellants.

E. S. & L. W. Doty, for appellees.

Per CURIAM. We affirm the decree upon the opinion of the learned president of the court below.

Decree affirmed, and appeal dismissed at the cost of the appellant.

COUNTY OF ALLEGHENY V. GIBSON.

(50 Penn. St. 297.)

Municipal corporation — liability for riot.

Under a statute making a county liable for property "situated" therein when destroyed by a mob, provided, upon knowledge of the destructive intention, notice was given by the owner to certain public authorities, and he himself was was guilty of no improper conduct, causing the destruction, *held*, that the liability attached for property owned by a non-resident of the State, in transit in the possession of a common carrier; that notice by the owner to the authorities was not required except where he had knowledge of the intention nor when the authorities themselves knew the intention; and that the county was not absolved although it was beyond its power to put down the riot, and although the State military was called out to suppress it, and fired upon the mob before the destruction of the property. (*See note, p. 682.*)

ACTION for property destroyed by a mob. The property was shipped at Cincinnati on the 16th of July, 1877, for Philadelphia, by the Pittsburgh, Cincinnati & St. Louis Railroad and the Pennsylvania Railroad; it arrived at Pittsburgh on the morning of the 19th of July; on the evening of that day the sheriff of the county of Allegheny was notified by the officers of the Pennsylvania Railroad Company that a number of men had forcibly taken possession of a portion of the railroad company's property, and the freight of shippers, and were obstructing the passage of trains, and was requested to go in person and disperse the mob. He sent for some of his deputies, and proceeded to the scene of the disturbance. Upon his arrival he found several hundred men in possession of the company's road, whom, as sheriff of the county, he ordered to disperse. This they positively refused to do, and said, "they were going to hold that road, and that they were going to wade in blood to their waists." The sheriff then sent a telegram to the governor asking for troops to quell the riot. An order was sent to the general commanding at Pittsburgh to assist the sheriff

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with troops. On Friday and Saturday efforts were again made by the sheriff to have the mob disperse, but on neither occasion was he accompanied with a posse or military force, his efforts to procure a posse having been unsuccessful. On the afternoon of Saturday he accompanied the portion of the State military force, which had arrived from Philadelphia, to 28th street, where the mob was in possession of the railroad. Here he again addressed the rioters and commanded them to disperse. His efforts were again unavailing, and the military were then brought up and attempted to force back the mob in possession of the road. The rioters assaulted the soldiery with stones, clubs and pistol shots, and the latter then fired on the mob and a number of persons were killed and wounded. In a few hours the mob was largely augmented in numbers, and during the evening and night, and the following morning, the property of the railroad company, including its shops, elevator and hotel, and the trains upon the road, were all destroyed by fire kindled by the mob, who surrounded the property and trains, and would allow no interference to extinguish it. In the fire thus enkindled the property in suit was burned. The plaintiff had judgment below.

S. H. Geyer, George Shiras, Jr., George W. Biddle and Daniel Agnew, for plaintiff in error.

D. T. Watson, M. W. Atcheson and Thomas M. Marshall, for defendants in error.

PAXSON, J. This was one of the cases brought against the county of Allegheny to recover damages for property destroyed by the mob during the riots of 1877. The particular property which is the subject of this suit consisted of sixty barrels of whisky, belonging to the plaintiffs below. It was wholly destroyed, and its value is not disputed. A verdict and judgment were had in favor of the plaintiffs, and the defendants have removed the record to this court for review. The questions it presents are of grave importance.

The plaintiffs have no common-law remedy. They must recover, if at all, by virtue of act of May 31st, 1841, Pamph. L. 416, which provides that "in all cases where any dwelling-house or other building or property, real or personal, has been or shall be destroyed within the county of Philadelphia, in consequence of any mob or

riot, it shall be lawful for the person or persons interested in and owning said property to bring suit against said county where said property was situated and being, for the recovery of such damages as he or they sustained by reason of the destruction thereof, and the amount which shall be recovered in said action shall be paid out of the county treasury, on warrants drawn by the commissioners thereof, who are hereby required to draw the same as soon as said damages are finally fixed and ascertained.

[Omitting a minor question.]

It is said that the plaintiffs did not prove any notice to a constable, alderman, or a justice of the peace of the ward, borough or township, or to the sheriff of the county in which their property was situated, of any intent to destroy their property, or of the fact that a mob had been collected for such purpose. Nor did they prove that sufficient time had not intervened to enable them to do so; and that in the absence of such proof, it was error in the court below to charge the jury that under all the evidence in the case, if believed by them, the plaintiffs were entitled to recover.

It is provided by the eighth section of the act of 1841, that "no person or persons shall be entitled to the benefits of this act if it shall appear that the destruction of his or their property was caused by his or their illegal or improper conduct, nor unless it be made to appear that he or they, upon the knowledge had of the intention or attempt to destroy his or their property, or to collect a mob for such purpose, and sufficient time intervening, gave notice thereof to a constable, alderman or justice of the peace of the ward, borough or township in which said property may be situated, or to the sheriff of the said county, and it shall be the duty of the said sheriff, alderman, constable or justice, upon the receipt of such notice, to take all legal means to protect said property, so attacked or threatened," etc.

It is manifest that a property-owner cannot be in default for want of having given notice under this act, unless, first, he had knowledge of an intention on the part of the mob to destroy his property; and second, that there was sufficient time intervening to give the notice contemplated by said act. It is equally clear that the object of such notice is to inform the proper officer, so that the property may be protected. These positions are fully sustained by authority, both in this State and in New York, where a statute similar to the act of 1841 exists. In *Donoghue v. County of Phil-*

delphia, 2 Barr. 230, it was said by Mr. Justice SERGEANT: "The next question is as to the notice. The act of assembly requires that notice be given to the sheriff, alderman, justice or constable, where there is sufficient time intervening. But in what cases is the party required by the act to give this notice? When he has knowledge of the intention or attempt to destroy his property, or to collect a mob for such purpose. It would be strange to require him to give notice when he has not such knowledge, and therefore in such case he is not debarred from his remedy, though he has not given such notice." In *St. Michael's Church v. County of Philadelphia*, Bright. 121, the defendant offered to prove that several days before the property was burned notice was given to two of the trustees of the church of such intention, and that they had neglected to give any notice to the sheriff. ROGERS, J., rejected the offer because the knowledge was not had by or notice given to the trustees in their corporate and official capacity. It would be equally unnecessary to give notice to the sheriff or other officer where he already had knowledge of the facts, or such notice would be unavailing for the purpose of protection. *Newberry v. New York*, 1 Sweeney, 369; *Schiellein v. Kings County*, 43 Barb. 491. That the sheriff of Allegheny county had knowledge of the mob and of their intention clearly appears from the testimony of that officer, offered by the defendants themselves. The sheriff had visited the mob on the evenings of July 19th, 20th and 21st. When he saw the mob on the evening of the 19th they had commenced their work by the forcible seizure and retention of possession of the property of the railroad company. When he ordered them to disperse they refused to do so, and told him "they were going to hold that road, and that they were going to wade in blood to their waists." The sheriff adds: The mob remained in possession of the road and increased in numbers, and that continued until Saturday evening. Mr. D. M. Watt was examined on behalf of the plaintiffs, and said that he called upon the sheriff, in company with Hon. John Scott, of counsel for the company, on Thursday night, July 19th, and informed that officer "that the property of the company was in possession of a mob at Twenty-eighth street, and that we were unable to move our trains or get possession of the switches, and that we desired protection. Mr. Scott called upon him, on the part of the company, for a proper force to protect the property of the company, and to protect the company in the movement of their business. No destruction of

property took place until after five o'clock P. M. of July 21st. It is manifest, therefore, the objection that proper notice was not given, under the act of 1841, is without foundation.

It was further objected that the plaintiffs' bailees, the Pennsylvania Railroad Company, were guilty of improper conduct, within the meaning of the act of 1841. The eighth section of that act provides that no "person * * * shall be entitled to the benefit of this act if it shall appear that the destruction of his property was caused by his * * * illegal or improper conduct." It was contended that by using the words "illegal or improper conduct," the law makes a distinction between conduct which is actually illegal and that which, although not technically unlawful, may be still improper. Just what is "improper conduct," within the meaning of the act of 1841, is a nice question. We are not without rulings in our own State and elsewhere, where similar statutes exist, that may throw somelight on the question. In *Donoghue v. Philadelphia*, *supra*, Chief Justice GIBSON placed his rulings on the legal rights of the owners of the property, and when it was urged that the introduction of armed men into the house, under the excitement existing at the time of the firing upon the mob, was injudicious, he replied, in his charge to the jury: "That it was justifiable to introduce men and arms into the house as the exercise of a freeman's privilege, whether there was an apprehension of danger or not; and that if the mob was not fired on until after it had begun the attack, this part of the defense had failed." To the same effect are the rulings of Mr. Justice ROGERS, in *Hermits of St. Augustine v. Philadelphia County*, Brightly, 116, and *St. Michael's Church v. Philadelphia County*, *id.* 121. It would seem to be clear that in order to defeat a recovery upon this ground, for property destroyed by a mob, the "improper conduct" must have been the proximate cause of the destruction. "Was caused" is the language of the act. In *Lavery v. Philadelphia County*, 2 Barr. 233, it was said by Mr. Justice SERGEANT: "In order to debar a person from the remedy provided by the act of assembly of 31st of May, 1841, it must be made to appear, in the words of the act, that the destruction of his property was caused by his illegal or improper conduct." In the State of New York, the statute reads, that "no person shall be entitled to recover, if it shall appear upon the trial thereof that such destruction was occasioned or in any manner aided, sanctioned or permitted by the carelessness or negligence or such person." *Ely v.*

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County of Niagara, 36 N. Y. 297, was decided upon this act. It was an action for the destruction of a dwelling-house. The county, in the court below, offered to prove that the house was a notorious bawdy-house, kept by the plaintiff as such; that it was the resort of prostitutes, thieves, and murderers; that prior to its destruction a policeman of the town was found murdered in front of the house, and that he was so murdered by some one who made the house a resort, and during a drunken debauch therein; that when this fact became known, the citizens were so enraged that in a body they assembled and destroyed the house. The court below rejected the offer, and this ruling was affirmed, both in the Supreme Court and the Court of Appeals, and it was held that the act of the plaintiff, which would prevent her recovery, must be the proximate cause, and the loss the natural and necessary consequence. See, also, *Blodgett v. County of Syracuse*, 36 Barb. 526. It has never yet been held that the assertion of a legal right in a legal manner, in pursuit of a legal and ordinary business, was such "improper conduct" as would prevent the owner of property destroyed by a mob, from recovering its value, under the act of 1841, or similar statutes. It is not pretended that the plaintiffs did any improper act. They were hundreds of miles away, and knew nothing of the destruction of their property until it was accomplished. But it is said they are responsible for the act of the Pennsylvania Railroad Company, their bailees. Conceding this to be so for the purposes of this case, what act of the company was illegal or improper, within the meaning of the statute? It was said that the mob was fired upon. Granted. But by whom? Not by the Pennsylvania Railroad Company, but by the military sent there by the governor of the State, in response to a telegram from the sheriff of Allegheny county, asking for troops to assist in quelling the riot. Whether the firing was judicious under the circumstances, we are not called upon to say. It is no part of this case. It is enough for us to know, that whether judicious or otherwise, it was an act for which neither the company nor the plaintiffs are responsible. But it is said the company reduced the wages of their employees, and in the face of the dissatisfaction produced thereby endeavored to move their trains in opposition to the will of the mob. A more untenable position than this could not well be imagined. For some days cars loaded with freight from distant points had been accumulating in the yards at Pittsburgh, by reason of the strike

and the refusal of the strikers to allow them to be moved forward to their destination. The result was a blockade, paralyzing the business of the country, upon this, one of its greatest arteries of commerce. In such a vast collection of freight there must have been much of a perishable nature. It was the duty, involving a legal responsibility on the part of the company, to forward it. In doing so they were but asserting a legal right and performing a legal duty which they owed to shippers and consignees. Their action was neither illegal nor improper under the act of 1841.

It was further objected, that "where an insurrection is by reason of its nature and extent beyond the power of the local authorities to anticipate or subdue, a county cannot be held liable for the loss of property destroyed during and in consequence of it." This proposition is a crystallization of the offers of evidence contained in the fourth and fifth assignments of error. To which may be added the point, pressed upon the argument, that after the appearance of the military of the State upon the scene, in obedience to the order of the executive authority, the responsibility of the county of Allegheny ceased. The word "insurrection" in this connection, is not applicable. The meaning of it is: "A rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or State; a rebellion; a revolt;" Worcester. There was nothing of the kind here. It was a mob, and nothing more. It has never been held that the responsibility of a city or county for the violence of a mob depends upon its size or formidable character, or that the failure of the civil authorities to suppress it, or that their calling upon the military authorities for aid relieved them from liability. History furnishes three notable instances which go far to establish the contrary view. The first one to which I refer was the "No Popery" riots of London, in June 1780. This was the most extensive riot of which we have any record. For several days the mob, numbering sixty thousand persons, had complete control of London. The authorities were paralyzed. The immediate cause of the tumult was the presentation of a petition by Lord George Gordon to Parliament for the repeal of Sir George Saville's act for the relief of Catholics. The riot commenced on June 2d, and continued until June 8th. It was not confined to the city of London, but spread throughout the kingdom. The whole city was in a state of anarchy. On the evening of June 6th, thirty-six different fires were raging,

caused by the mob. The famous prisons of the Fleet and King's Bench were fired, and the prisoners released; all the public buildings threatened; many private houses sacked, including that of the chief magistrate of the highest criminal court in the kingdom, Lord Mansfield, whose furniture, pictures, books and papers were all burned. More than four hundred and fifty persons were killed. It was only by the vigorous use of the military power that the mob was finally subdued. The courts of England held that the loss fell within the statute, and the respective hundreds were liable. Another instance is the Philadelphia riots of 1844. Here, again, the civil power was wholly inadequate to suppress the mob, and it was only put down at last by the stern use and display of the military arm. Said the late Judge KING, in his charge to the grand jury: "Our city during these scenes of violence has exhibited the appearance of a town of war, instead of the pacific seat of science and literature, of commerce and the industrial arts." The amount of property destroyed was large, for all of which, the county was held liable under the act of 1841. Later still, we have the draft riots of New York in 1863, when an entire army corps was withdrawn from the front, where it was sorely needed, to hold in check the rebellious elements of that city. In numerous cases the Court of Errors and Appeals held the city liable. *Newberry v. New York*, 1 Sweeney, 369; *Davidson v. Mayor*, 2 Robt. 230; *Darlington v. Same*, 31 N. Y. 164. Some idea of the extent of the damages caused by the mob during this riot may be inferred from the fact that upon the argument of the case last cited, counsel representing the plaintiffs in nine hundred and fifty other cases were heard. It may be that the point now under discussion was not made in any of the suits growing out of the three great riots above referred to. I do not find any trace that it was. In view of the hundreds of cases, of the large interests involved, of the number of eminent counsel employed, not only in England, but in New York, and in this State, the fact that no such point has ever before been made, is persuasive evidence that there is nothing in it. This, however, is not conclusive, and in view of the gravity of the issue involved, we will consider it as a new question.

The act of 1841 is both a remedial and penal statute. It is remedial, so far as it provides for compensation to the person whose property has been destroyed, and penal, so far as it throws the burden of that compensation upon the municipality within whose

borders the destruction took place. It is but an extension of the ancient English law, which made the inhabitants of the respective hundreds responsible for robberies committed therein. Formerly, as we have seen, a person robbed had his remedy against any inhabitant of the hundred; that is to say, the inhabitants were jointly and severally liable. Then the law was so changed, that damages recovered against an individual could be assessed against all the inhabitants, so as to compel contribution. Afterward it was still further modified so as to give the right of action against the hundred. The principle upon which this legislation rested was that every political subdivision of the State should be responsible for the public peace and the preservation of private property; and that this end could be best subserved by making each individual member of the community surety for the good behavior of his neighbor and for that of each stranger temporarily sojourning among them. The effect was to make each citizen a detective, and on the alert to prevent as well as to detect and punish crime. There was no exception in favor of robberies committed by overwhelming numbers, and by such a show of force as to overawe and overpower the limited constabulary of the hundred, or such as were committed by strangers. In either case the hundred was liable to the person robbed, however difficult or impossible it might be for the inhabitants to anticipate or prevent it. It was evidently a police regulation, based upon grounds of public policy, and enforced without regard to the hardships of particular cases. Our act of 1841 is also a police regulation, and rests upon like grounds of policy. Under our political system the State grants a portion of its sovereignty to certain municipalities. It clothes them with certain of its powers, and exacts from them in return the performance of certain duties. Among the powers granted is that of maintaining a police force. Among the duties exacted is that of preserving the public peace. There is an implied contract between the State and every municipality, upon which it bestows a portion of its sovereignty, that such municipality shall preserve the public peace, and maintain good order within its borders. The State lends its aid when the local authorities are overborne, and a call for assistance is made in the manner pointed out by law. But it is entirely within the power of the sovereign to make such communities responsible for the preservation of order. The privileges conferred must be taken with such burdens as the law-making power chooses to annex thereto, and

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where liability for mob violence is imposed without qualification, it is not within the scope of judicial power to write exceptions into the law which the legislature, in its wisdom, has not seen proper to place there. It may seem a harsh rule to hold a community responsible for the effects of mob violence, which apparently, at least, they had no power to prevent; yet not more so than to hold every inhabitant of the English hundred liable for a robbery of which he knew nothing, and had no means of arresting.

In both cases it is a police regulation. It is based upon the theory, that with proper vigilance, the act might and ought to have been prevented. That this is true with mobs, as a general rule, is well known. A mob is always cowardly, and usually of slow growth. It increases in size and courage just in proportion as the authorities evince hesitation or timidity. That this hesitation is often the result of indifference, if not of open sympathy, is unfortunately too true. It is rare that a mob is without a large body of sympathizers at its commencement. This is because its fury is generally directed against an unpopular object. In populous communities, especially in large cities, there are always antagonisms of race, religion, politics or social condition, which enable the demagogue to fan the fires of popular discontent, and incite the disorderly to acts of violence. It is because of this sympathetic feeling that mobs are often enabled to get the mastery, the fact being overlooked that a mob, when once aroused and maddened by success, becomes, like a wild beast, dangerous alike to friend and foe. There is nothing upon the face of this record to show that the Pittsburgh riots of 1877 were an exception to this rule. We see no evidence of any serious attempt upon the part of the local authorities to suppress it at the time of its commencement. A feeble attempt was made by the sheriff, resulting in the enrollment of some half-dozen deputies. But there was no proclamation calling upon the body of the county to come to his assistance, in preserving the public peace. No one doubts at this day that if a proper effort had been made at the proper time, the mob could have been held in check. No one doubts that it would have been, had the citizens of the county realized that they were responsible for the loss. But this act of assembly, folded away among the pamphlet laws, was probably forgotten or overlooked, even by those who knew of its existence. In the end, the mob that had defied the military power was put down in the main by the civil authorities, after the citizens had been

aroused by a sense of common danger. The law will not tolerate the spectacle of a great city looking on with indifference, while property to the value of millions is being destroyed by a mob. To prevent just such occurrences was one of the objects of the act of 1841. The fact that the State, when called upon, rendered its assistance, and sent a portion of its military to the scene, did not absolve the county from its implied obligation to preserve the peace, nor from its responsibility for a neglect of that duty. Were it otherwise, it might be to the interest of a municipality to increase the size of the mob.

The right of the plaintiffs to recover is further resisted upon the ground, 1. That being non-residents, they are not entitled to the benefit of the act of 1841; and 2, That the property having been shipped at Cincinnati for Philadelphia, and destroyed on the *car en route*, was not "situate" in the county defendant, within the meaning of the act. The first ground of objection appears to be based upon a mistake of fact. The "history of the case," furnished by the defendant, asserts that the plaintiffs are citizens of Philadelphia. I notice, however, that in the case of Webb & Son, argued with this, the plaintiffs are citizens of Baltimore, Maryland. As therefore the point must be met in that case, I will dispose of it here.

No authority has been cited, nor has any sufficient reason been shown, why the act should not apply to the property of non-residents. It is broad enough in its terms to cover it. "In all cases," is the language of the statute. There is nothing in the spirit or reason of the act to discriminate against non-residents. The stranger robbed had his remedy against the hundred, as well as if he had been an inhabitant thereof. Our entire system of law, for the protection of person and property, places the citizen and stranger upon the same plane of security. It has never yet said to a mob: You must not touch the property of A., because he is a citizen of the State, but you may work your will upon the property of B., because he is a non-resident. On the contrary, it protects the property of a stranger stopping for a single night at a hotel, so far as he brings it with him, precisely as it protects that of a life-long citizen. Any other rule would be churlish and inhospitable, and if successfully asserted, would very materially lessen the business of the State, by diverting passengers and freight into channels where a more liberal rule of law prevailed.

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Was the property situated within the county? Strictly speaking, personal property cannot be said to have a *situs*. It is situated wherever it may happen to be for the time being. This is all that the word means in the act of assembly as applicable to personal property of this description. The act as before stated is remedial as to the sufferer. Similar acts have been invariably so regarded, and have been construed liberally. In *Hyde v. Cogan*, 2 Doug. 699, which was one of the cases growing out of the Lord George Gordon riots of 1780, the statute was largely considered, and all the judges except Lord MANSFIELD gave an opinion. Said WILLES, J.: "The sixth clause I rather consider as remedial. It may be said to be penal as to the hundred, but is certainly remedial as to the sufferer." ASHHURST, J.: "The purpose of this act is remedial, and therefore it ought to receive a liberal construction." BULLER, J.: "The statute is so penned that the words might possibly admit of two constructions, and therefore it is material to consider whether it is penal or remedial, because there is a well-known difference in the rule of construction as applied to laws of the one sort and of the other. When they are remedial the interpretation is to be liberal, so as best to apply to the end. * * * If the clause upon which this case arises (6) is remedial, which I think it is, the most extensive sense must prevail, and it was so held in both cases cited at bar. *Radcliffe v. Eden*; *Wilmot v. Horton*. But independent of authority, as the clause is remedial, it must receive a liberal construction." It was accordingly held in that case that under the statute of George I, commonly called the Riot Act—which made it felony without benefit of clergy for any persons unlawfully, riotously and tumultuously assembled together, to the disturbance of the public peace, unlawfully and with force to demolish or pull down any church or chapel, or any building for religious worship, etc.—if any persons riotously assembled, in part demolish or pull down a dwelling-house, and at the same time destroy goods and furniture in the house, although such goods and furniture were not destroyed by means of the pulling down of the house, the hundred is liable, under the above statute, for the destruction of the furniture, as well as of the house. And in *Donoghue v. City of Philadelphia*, *supra*, an accidental destruction by fire, communicated from a building fired by a mob, was held to be within the act. In *Commissioners of Kensington v. County of Philadelphia*, 1 Harris, 76, it was held that a municipal corporation is included within the

term person or persons, authorized by the act of 1841, to bring suit for injury to its property by a mob. Of a similar statute in New York the Supreme Court of that State in *Schiellein v. Kings County*, *supra*, said: "The statute must receive a reasonable and liberal construction." And of our own statute Justice ROGERS said at *nisi prius*, in *Hermits of St. Augustine v. County of Philadelphia*, *supra*: "The act of assembly has been carefully drawn, and is wise, just and beneficial in its character. * * * If the act is always rigidly enforced when violated, the effect will be found highly beneficial." It requires no strain to bring the property in question within the letter and spirit of the act of 1841. On the contrary, it would require a wrenching of the law to hold that the act did not apply.

The learned judge was right in rejecting the offers of evidence embraced in the second, third and fourth specifications. It is manifest that if received they would not have amounted to a defense. The offers were also vague, involving conclusions rather than facts. An offer to show that the mob was beyond the control of the civil authorities was incomplete in the absence of any attempt to prove its numbers or size, or that an effort had been made to suppress it. An examination of the bill of exceptions shows that while the learned judge rejected the offers as a whole, he nevertheless allowed the witnesses to proceed, with the understanding that they were to be checked if necessary. In this way the defendants got before the jury a very full history of the riots, which was not contradicted in its essential features.

Upon all the points presented the law is against the county. The judgment must therefore be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — In *Solomon v. City of Kingston*, 24 Hun, 562, the plaintiff's store took fire, and a crowd, which had assembled to see the fire, having shown an inclination to break into the store, the chief engineer turned a stream of water upon them, whereupon he was struck with a brick, and went away to get a revolver. While he was gone — some fifteen minutes — the crowd kicked the door and windows open, went into the store, broke the show-cases therein, threw and left upon the floor a portion of the goods, and carried other portions of them away. It was held that the city was liable, under the statute, for the loss and damage, as well as for what was carried off as for what was literally "destroyed," and that notice to the public authorities of the danger was unnecessary under the circumstances. LEARNED, P. J., said: "It is plain that though the original purpose for which the crowd assembled was lawful, yet they might unite in unlawful conduct, and thus become rioters." "It could make no real difference whether the rioters actually destroyed the personal property on the premises of Solomon, or whether they took it out of his premises and then actually destroyed it. And whether they destroyed the boots and shoes by cutting them to pieces, or by wearing them out, would matter very little to the plaintiff." "When the crowd became a riot, there was no time to give notice."

SALTONSTALL V. LITTLE.

(90 Penn. St. 422.)

Deed — reservation of timber — limitation of time of entry.

In a deed reserving the right to cut and remove timber, "at any and all times, also the right of ingress and egress at any and all times for the space of twelve years from the date above written, for the purpose so as aforesaid," the right of entry and of property ceases with the twelve years.*

EJECTMENT. The decision depended on the construction of the following clause in a deed: "And also reserving unto the parties of the first part hereto, their heirs and assigns, all the pine timber on the aforesaid six warrants or tracts, together with the right and privilege to cut, remove, take and carry away the same, or any part thereof, at any and all times, also the right of ingress and egress at any and all times, for the space or term of twelve years from the date first above written for the purpose so as aforesaid." The plaintiff had judgment below.

George A. Rathbun, for plaintiffs in error.

John G. Hall and *C. H. McCauley*, for defendant in error.

PAXSON, J. Whether we regard the clause in controversy, in the deed from Kingsbury to Veazie, as a reservation or an exception, the result is the same, for in either event Kingsbury or his grantee of the timber was restricted to twelve years, in which to cut and remove it. The reservation of the timber was not an absolute severance of it from the freehold. It was a severance only upon the condition of its removal within twelve years. It is true no such express condition appears, and the words *proviso, ita quod* and *sub-conditions*, so much relied upon by Lord COKE, are not to be found in the reservation. But conditions may be implied as well as expressed. There is abundance in the reservation from which such a condition may be implied. "If a man grant all his trees to be taken within five years, the grantee cannot take any after the expiration of five years, for this is in the nature of a condition annexed to the grant." Bacon's Abr., tit. Grant. In *Boults v.*

* See *contra*, *Irons v. Webb* (12 Vroom, 202), 22 Am. Rep. 122, and note, 167.

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Mitchell, 3 Harris, 371, there was a sale of the land, excepting and reserving therefrom all the timber that is suitable for rafting and sawing of every description." In that case no time was limited within which the timber must be removed, yet it was held that "the grant was in its very nature determinable; the right to cut timber was not to continue forever at the pleasure of the grantee and his assigns; and if from the destruction of the trees, the subject of it, or the refusal of the party to exercise his right after a reasonable notice to do so, the right itself is determined; the privilege of entry is gone with it, and the owner of the land may sue for breach of close, though he may not recover in damages the value of trees taken, the property of which is not in him." In the case in hand, the parties have fixed the time during which the trees may be removed. Had no time been limited, the law would have allowed a reasonable time in order that the grantor might not be defeated of his reservation. But he would have been compelled to remove them upon reasonable notice, otherwise the reservation would have been a perpetual servitude, which was not contemplated by the parties, and is repugnant to the grant. Having fixed their own time for the removal of the timber, it is too clear for argument, that the right of entry falls with its expiration. It was contended, however, that even if the right of entry is gone, the right of property in the trees remains, and the case stated was evidently framed to meet this possibility. It would certainly be a barren right to own trees upon another's land, with no right of entry to take them away. The plaintiffs have no such property in the timber. The limitation upon the right of entry was a limitation upon the exception itself. It was a reservation of the timber for twelve years and no longer. After that time, the trees remaining passed with the grant of the soil to which they were attached. This is the construction placed upon such agreements in the lumber regions where they are frequent, and it accords with reason and common sense. We made a somewhat similar ruling in *Leconte v. Royer*, decided in 1877.

It also appears by the case stated, that Kingsbury sold the timber in question, to one Joseph S. Hyde, twenty-six days before his deed to Veazie, with the right to take it off for twelve years from the date of the sale. Whatever the rights of the defendants may be, the plaintiffs by their own showing have none.

The judgment is reversed, and judgment on the case stated for the defendant.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

CRAIGHEAD V. WELLS.

(§ Bart. 33.)

Negotiable instrument — transfer for antecedent debt.

A note of a third person, transferred as security for an antecedent debt, the transferee giving up nothing and incurring no fresh liability, is subject to equities as between the transferree and the maker. (*See note, p. 688.*)

ACTION to enforce vendor's lien. The opinion states the case.
The complainant had judgment below.

Key & Richmond, for complainant.

A. A. Hyde, for defendant.

NICHOLSON, C. J. Craighead filed his bill in the Chancery Court at Jasper, to enforce his vendor's lien against a lot in Jasper. He claims the lien by the transfer to him of three notes of \$133 each, by E. T. Redfield & Co., on Albert Wells, given for the lot, with a title bond to convey title when the purchase-money is paid. The bill was taken for confessed as to Redfield and A. Wells.

W. Byrne, the partner in the firm of E. T. Redfield & Co., answers and contests Craighead's lien. He states that E. T. Redfield & Co. conveyed the lot to W. Byrne, as trustee, to secure debts due to Christian Byrne, and that afterward, with the consent of Christian Byrne, he made a private sale of the lot to A. Wells for \$400, and took his three notes for \$133.33, each payable to E. T. Redfield & Co.; that he took and held the notes for the benefit of Christian Byrne, and while they were so held, his partner, E. T. Redfield, got possession of the notes and transferred them by delivery to Thos. G. Craighead as collateral security for a liability of Craighead as stayor for D. T. Redfield & Co.; that afterward the liability of Craighead was released by payment of the debt, but that the notes were then held as indemnity for other liabilities of Craighead for E. T. Redfield & Co., and that the notes were afterward indorsed to Craighead by E. T. Redfield, and that Craighead took and held the notes, with full notice that they were a trust fund for the benefit of Christian Byrne.

W. Byrne filed his answer as a cross-bill, making Craighead, E. T. Redfield, A. Wells, and Christian Byrne defendants.

Craighead demurred to the cross-bill of W. Byrne, but his demurrer was overruled, and he was allowed to answer. Craighead answered the cross-bill, insisting on his lien as claimed in his original bill. Neither of the other defendants to the cross-bill answered, nor was process served on them.

The chancellor dismissed the cross-bill on the hearing, and decreed a sale of the lot to satisfy Craighead's lien. It is not denied that the three notes and the judgments rendered thereon against Wells in favor of Craighead are liens on the lot in controversy. But the question is, whether Craighead, the indorsee of the notes, or W. Byrne, the trustee for Christian Byrne, is entitled to the benefit of lien. The probate of the deed of trust was not sufficient to admit it to registration, the clerk failing to certify that he was personally acquainted with E. T. Redfield, the maker thereof; but it is shown by the proof that Wells purchased from W. Byrne with knowledge of the trust deed. The registration, therefore, was not material, as between them.

It appears further that the deed of trust, although it purports to be made by E. T. Redfield & Co., was in fact only executed by E. T. Redfield; the other party, W. Byrne, not having signed it. But the deed was made to W. Byrne, who already had the title as part-

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ner, and as he consented to the conveyance, and held the title as trustee, and still claims as trustee, the beneficiary, Christian Byrne, is entitled to its benefits, unless Craighead has acquired a superior lien as an innocent purchaser and holder of the notes.

In his answer to Byrne's cross-bill Craighead says: "These notes, as well as respondent remembers, were placed in his hands by E. T. Redfield to secure respondent as stayor upon a judgment in favor of Thomas Wood against E. T. Redfield & Co., and were placed in his hands before he entered his name as stayor. This judgment was afterward settled by said Redfield & Co., as respondent was and is informed; and upon its payment said Redfield directed respondent to retain them as collateral, collect them if possible, and apply the proceeds to the payment of a debt due John Cummings against said Byrne & Redfield, and on which respondent was security, or any others upon which he was liable."

He states further that when the notes were delivered to him by E. T. Redfield he had no knowledge of the claim of Christian Byrne and others, but he had knowledge of his claim before he procured E. T. Redfield to indorse the notes to him in the firm name of E. T. Redfield & Co.

Upon the principle decided in *Kimbro v. Lytle*, 10 Yerg. 429, which has been repeatedly followed in this court, when Craighead received the note as collateral, and therefore incurred the liability of a stayor to the judgment of Wood against E. T. Redfield & Co., he took them in due course of trade and free from any equities outstanding against them. But he proceeds to state that the Wood judgment was paid by Redfield & Co., and then he retained the notes, with Redfield's consent, as indemnity against his liability for Redfield & Co. on a debt to Cummings and other liabilities. There were pre-existing liabilities for which the notes were held as indemnity by Craighead. He gave up nothing and incurred no liability upon receiving the notes.

In the case of *Kimbro v. Lytle*, 10 Yerg. 423, this court said: "That due course of trade is where the holder has given for the note his money, goods or credit at the time of receiving it, or has, on account of it, incurred some loss or incurred some liability." But in *Codington v. Bay*, 20 Johns. 637, 11 Am. Dec. 842, approved by this court in *Kimbro v. Lytle*, and *Nichol v. Bate*, 10 Yerg. 432, it was held that where notes were fraudulently passed by an agent to secure the defendant against responsibilities assumed by him as indorser

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of his notes, they not being received in the due course of trade, nor for a present consideration, the defendant was not entitled to hold them against the true owner. This authority is conclusive against the right of Craighead to hold the three notes as against Byrne, the real owner. The notes were payable to E. T. Redfield & Co., but really belonged to W. Byrne for the benefit of Christian Byrne. Redfield, as partner of W. Byrne, got possession of the notes and transferred them to Craighead, who was his father-in-law, to secure him against existing liabilities for E. T. Redfield & Co. If these notes are decreed to W. Byrne, Craighead has lost nothing. He gave nothing for them, and incurred no new liability upon receiving them. It follows that he did not receive them in due course of trade, but that he took them subject to the equities of W. Byrne as trustee for Christian Byrne.

The decree of the chancellor dismissing Byrne's cross-bill and giving Craighead relief on his original bill will be reversed, and Craighead's original bill will be dismissed, and a decree will be rendered giving Byrne relief on his cross-bill. The costs of this court and of the court below will be paid by Craighead.

Decree reversed.

NOTE BY THE REPORTER.— See *contra*, *Mix v. Nat. Bank of Bloomington*, 91 Ill. 30; a c. 33 Am. Rep. 44, and note, 46. The subject has been recently discussed and decided to the contrary in *Brooklyn City and Newtown Railroad Co. v. Nat. Bank of the Republic*, in the Federal Supreme Court, October term, 1879. The court there said, by HARLAN, J.: "The bank, we have seen, received the note before its maturity, indorsed in blank, without any express agreement to give time, but without notice that it was other than ordinary business paper, or that there was any defense thereto, and in ignorance of the purposes for which it had been executed and delivered to Hutchinson & Ingersoll. Did the bank, under these circumstances, become a holder for value, and as such entitled, according to the recognized principles of commercial law, to be protected against the equities or defenses which the railroad company may have against the other parties to the note?"

"This question was carefully considered, though perhaps it was not absolutely necessary to be determined, in *Swift v. Tyson*, 16 Pet. 1. After stating that the law respecting negotiable instruments was not the law of a single country only, but of the commercial world, the court, speaking by Mr. Justice STORY, said: 'And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language) that the holder of a negotiable instrument is unaffected with the equities between antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due; we are prepared to say that receiving it in payment of, or as security for a pre-existing debt, is according to the known usual course of trade and business. And why, upon principle,' continued the court, 'should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his

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debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in the payment of, or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuitry to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably more than one-half of all the bank transactions in our country as well as those of other countries are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.'

"After a review of the English cases, the court proceeded: 'They directly establish that a *bona fide* holder, taking a negotiable note in payment of, or as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties.'

"The opinion in that case has been the subject of criticism in some courts, because it seemed to go beyond the precise point necessary to be decided, when declaring that the *bona fide* holder of a negotiable note taken as collateral security for an antecedent debt, was protected against equities existing between the original or antecedent parties. The brief dissent of Mr. Justice CARSON was solely upon that ground, which renders it quite certain that the whole court was aware of the extent to which the opinion carried the doctrines of the commercial law upon the subject of negotiable instruments transferred or delivered as security for antecedent indebtedness. In the judgment of this court, as then constituted (Mr. Justice CARSON alone excepted), the holder of a negotiable instrument, received before maturity, and without notice of any defense thereto, is unaffected by the equities or defenses of antecedent parties, equally whether the note is taken as collateral security for, or in payment of, previous indebtedness. And we understand the case of *McCarty v. Root*, 21 How. 439, to affirm *Swift v. Tyson*, upon the point now under consideration. It was there said: 'Nor does the fact that the bills were assigned to the plaintiff as collateral security for a pre-existing debt, impair the plaintiff's right to recover. * * * The delivery of the bills to the plaintiff as collateral security for a pre-existing debt, under the decision of *Swift v. Tyson*, was legal.'

"It may be remarked in this connection that the courts holding a different rule have uniformly referred to an opinion of Chancellor KENT in *Bay v. Coddington*, 5 Johns. (N. Y.) 56, 9 Am. Dec. 268, reaffirmed in *Coddington v. Bay*, 20 Id. 637; 11 Am. Dec. 342. There is, however, some reason to believe that the views of that eminent jurist were subsequently modified. In the 6th edition of his Commentaries, side page 81, note b, prepared by himself, reference is made to *Stalker v. McDonald*, 6 Hill, 93, in which the principles asserted in *Bay v. Coddington* were re-examined and maintained in an elaborate opinion by Chancellor WALWORTH, who took occasion to say that the opinion in *Swift v. Tyson* was not correct in declaring that a pre-existing debt was of itself, and without other circumstances, a sufficient consideration to entitle the *bona fide* holder, without notice, to recover on the note, when it might not, as between the original parties, be valid. But Chancellor KENT adds: 'Mr. Justice STORY, on Promissory Notes, p. 215, note 1, repeats and sustains the decision in *Swift v. Tyson*, and I am inclined to concur in that decision as the plainer and better doctrine.' Of course it did not escape his attention that the court in *Swift v. Tyson* declared the equities of prior parties to be shut out as well when the note was merely pledged as collateral security for a pre-existing debt, as when transferred in payment or extinguishment of such debt.

"According to the very general concurrence of judicial authority in this country as well as elsewhere, it may be regarded as settled in commercial jurisprudence — there being no statutory regulations to the contrary — that where negotiable paper is received in payment of an antecedent debt; or where it is transferred by indorsement, as collateral security for a debt created, or a purchase made at the time of transfer; or the transfer is to secure a debt, not due, under an agreement express or to be clearly implied from the circumstances, that the collection of the principal debt is to be postponed or delayed until the collateral

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matures; or where time is agreed to be given and is actually given upon a debt overdue in consideration of the transfer of negotiable paper as collateral security therefor; or where the transferred note takes the place of other paper previously pledged as collateral security for a debt, either at the time such debt was contracted for or before it became due; in each of these cases the holder who takes the transferred paper before its maturity, and without notice, actual or otherwise, of any defense thereto, is held to have received it in due course of business, and in the sense of the commercial law, becomes a holder for value, entitled to enforce payment without regard to any equity or defense which exists between prior parties to such paper.

"Upon these propositions there seems at this day to be no substantial conflict of authority. But there is such conflict where the note is transferred as collateral security merely, without other circumstances, for a debt previously created. One of the grounds upon which some courts of high authority refuse in such cases to apply the rule announced in *Swift v. Tyson* is, that transactions of that kind are not in the usual and ordinary course of commercial dealings. But this objection is not sustained by the recognized usages of the commercial world, nor, as we think, by sound reason. The transfer of negotiable paper as security for antecedent debts, nothing more, constitutes a material and an increasing portion of the commerce of the country. Such transactions have become very common in financial circles. They have grown out of the necessities of business, and in these days of great commercial activity they contribute largely to the benefit and convenience both of debtors and creditors. Mr. Parsons, in his Treatise on the Law of Promissory Notes and Bills of Exchange, discusses the general question of the transfer of negotiable paper under three aspects—one, where the paper is received as collateral security for antecedent debts. We concur with the author, 'that when the principles of the law merchant have established more firmly and unreservedly their control and their protection over the instruments of the merchant, all of these transfers (not affected by peculiar circumstances) will be held to be regular, and to rest upon a valid consideration.' 1 Pars. on Notes and Bills, 218 (2d ed.)

"Another ground upon which some courts have declined to sanction the rule announced in *Swift v. Tyson* is, that upon the transfer of negotiable paper merely as collateral security for an antecedent debt, nothing is surrendered by the indorsee—that to permit the equities between prior parties to prevail deprives him of no right or advantage enjoyed at the time of transfer; imposes upon him no additional burdens, and subjects him to no additional inconveniences.

"This may be true in some, but it is not true in most cases, nor, in our opinion, is it ever true when the note, upon its delivery to the transferee, is in such form as to make him a party to the instrument, and to impose upon him the duties, which, according to the commercial law, must be discharged by the holder of negotiable paper in order to fix liability upon the indorser.

"The bank did not take the note in suit as a mere agent to receive the amount due when it suited the convenience of the debtor to make payment. It received the note under an obligation imposed by the commercial law to present it for payment and give notice of non-payment in the mode prescribed by the settled rules of that law. We are of opinion that the undertaking of the bank to fix the liability of prior parties by due presentation for payment and due notice in case of non-payment—an undertaking necessarily implied by becoming a party to the instrument—was a sufficient consideration to protect it against equities existing between the other parties, of which it had no notice. It assumed the duties and responsibilities of a holder for value and should have the rights and privileges pertaining to that position. The correctness of this rule is apparent in cases like the one now before us. The note in suit was negotiable in form, and was delivered by the maker for the purpose of being negotiated. Had it been regularly discounted by the bank at any time before maturity, and the proceeds either placed to the credit of Hutchinson & Ingersoll, or applied directly to the discharge, *pro tanto*, of any one of the call loans previously made to them, it would not be doubted that the bank would be protected against the equities of prior parties. Instead of procuring its formal discount Hutchinson & Ingersoll used it to secure the ultimate payment of their own debt to the bank. At the time the written agreement of July 23, 1873, was executed, by which this note, with others, was pledged as security for any debt then or thereafter held against them, the bank had the

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right to call in the \$10,000 loan, that is, to require immediate payment. The securities upon which that loan rested had become in part worthless, and it is evident that but for the deposit of additional collateral securities, the bank would have called in the loan, or resorted to its rightful legal remedies for the enforcement of payment. It was, under the circumstances, the duty of the debtors to make such payment, or to secure the debt. It was important to them, and was in the usual course of commercial transactions, to furnish such security. If the bank was deceived as to the real ownership of the paper, or as to the purposes of its execution and delivery to Hutchinson & Ingersoll, it was because the railroad company intrusted it to those parties in a form which indicated that the latter were its rightful holders and owners, with absolute power to dispose of it for any purpose they saw proper.

"Our conclusion, therefore, is that the transfer, before maturity, of negotiable paper as security for an antecedent debt merely, without other circumstances, if the paper is so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case the *bona fide* holder is unaffected by equities or defenses between prior parties of which he had no notice. This conclusion is abundantly sustained by authority. A different determination by this court would, we apprehend, greatly surprise both the legal profession and the commercial world. Bigelow's Bills and Notes, 508 *et seq.*; 1 Daniel on Neg. Instr. (3d ed.) ch. 25, §§ 830 to 833; Story on Prom. Notes, §§ 183, 185 (17th ed.) by Thorndyke; 1 Pars. on Notes and Bills, §18 (3d ed.), § 4, ch. 6; and Redfield & Bigelow's Lead. Cas. on Bills of Ex. and Prom. Notes, where the authorities are cited by the authors."

BANK OF LOUISVILLE V. FIRST NATIONAL BANK OF KNOXVILLE.

(8 Baxt. 101.)

Agency — bank receiving draft for collection at a distance — action for negligence of sub-agent.

A bank receiving, for collection, a draft payable at a distant place, and transmitting the same to a reputable agent at that place, is not liable for loss incurred by the negligence of the latter, and having voluntarily paid the claim of the payee, cannot maintain an action for such negligence against such agent. (*See note, p. 695.*)

ACTION of negligence. The opinion states the case. The plaintiff had judgment below.

Cocks, Henderson & Tillman for plaintiff.

Webb & Taylor for defendant.

Baxter & Son for Brown.

DEADERICK, J. This is an action on the case brought in the Circuit Court of Knox county by the Bank of Louisville against

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the First National Bank of Knoxville and Charles H. Brown, to recover damages for the failure of said National banks and Brown, a notary public, to protest a bill of exchange sent by plaintiff to defendant, said National bank, whereby a loss resulted to plaintiff. The verdict and judgment were in favor of Brown and against the National bank, and both banks have appealed in error to this court.

The record shows that in August, 1870, the Leather Manufacturers' Bank of New York sent to the plaintiff for collection a bill of exchange for \$927, dated June 1, 1870, payable three months after date, drawn by E. Simmerly in favor of Howes, Hyatt & Co., and accepted by W. B. C. & R. A. Smith, payable at the said First National Bank in Knoxville. The bill was transmitted by the Louisville Bank to the First National Bank, and received by it, on the 2d of September, 1870, and returned, unpaid, by said National bank on the next day without having been protested.

The cashier of the First National Bank testifies that he delivered the bill in question to defendant Brown, who was a notary public in good repute at the time, and in the absence of the president temporarily employed as clerk in said bank, with two others, stating to him one was to be answered and two to be protested. By inadvertence the bill in controversy, which it was intended should be protested, was returned to plaintiffs by mail.

Upon these facts, the plaintiff being advised that it was responsible for the negligence of the First National Bank and the notary public, and liable to the bank in New York for the amount of the bill, upon demand made by said bank, paid the amount of the bill, and brought this suit to recover from defendants below.

The theory of the plaintiff is that the acceptors were insolvent, and by reason of the failure to protest and give notice to drawer a loss has resulted which it, as agent of the owner of the bill, was liable to make good, and did pay, and thereby became owner of the bill, with the right to sue and recover of defendants for their negligence, which occasioned the loss.

While for the defense it is insisted that plaintiff was not liable to the New York bank for the default or breach of duty by the First National Bank or the defendant Brown, and that they, if liable to any one, are liable for a tort to the owner of the bill, and that by a voluntary payment by plaintiff to the New York bank, no cause of action arises to plaintiff, nor can the cause of action originating in a tort be assigned.

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Plaintiff cites and relies upon the New York case of *Allen v. Merchants' Bank*, 22 Wend. 215, in which it was held by the court for the correction of errors that "a bank receiving for collection a bill of exchange drawn here upon a person residing in another State, is liable for any neglect of duty occurring in collection, whether arising from the default of its officers here, its correspondents abroad, or of agents employed by such correspondents."

This liability, it is held, may be varied, however, either by express contract or by implication arising from general usage in respect to such paper. It was accordingly held in that case by a majority of the court, where a bill of exchange was drawn in New York on a resident of Philadelphia, and was deposited in a New York bank for collection, and was transmitted by that bank to a Philadelphia bank, the notary of which was guilty of a neglect whereby loss accrued, that the New York bank was liable to the holder of the bill. This liability is imposed upon the ground of an implied undertaking by the bank receiving the bill for collection to take all necessary measures to charge the parties to the bill, and this holding has ever since been adhered to by the courts of New York, and has also been adopted in the State of Ohio.

On the other hand, the cases are numerous where the contrary doctrine has been held by the Supreme Courts of Massachusetts, Connecticut, Louisiana, Illinois, Wisconsin, Mississippi, Maryland, Pennsylvania, and other States. In these States, in reported cases, in some of which the doctrine established in New York by the case in 22 Wendell, is reviewed and disapproved, it is held that the more reasonable and just construction of the nature of the undertaking of the bank in which the bill is deposited for collection is, that where the bill is payable at another and distant place, the bank so receiving the bill discharges itself of liability by transmitting the same in due time to a suitable and reputable bank or other agent at the place of payment, and in such a case it is manifest that a sub-agent must be employed, and the assent of the principal is implied, as it cannot be said that the receiving bank was expected or bound to send one of its own officers to the distant point of payment, for the purpose of personally attending to the collection, for the very inadequate compensation usually paid to banks for such service. And this, we think, is the more equitable rule, and all that is required is, that the bank receiving such bill in the first place should act in good faith in the selection of a proper agent to protect the

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interests of the holder of the bill. *Dorchester & M. Bk. v. N. E. Bank*, 1 Cush. 186; *Lawrence v. Bank*, 6 Conn. 521; *East Had-dam Bank v. Scovil*, 12 Conn. 303; *Atina Ins. Co. v. Alton Bank*, 25 Ill. 243; *Citizens' Bank of Baltimore v. Howell*, 8 Md. 530; Para. Mer. L. 145, and note 2.

These and other cases, including the New York and Ohio cases, *contra*, are reviewed in Mr. Morse's Treatise on Banks and Bank-ing, pp. 347 to 356, in which he concludes that the weight of au-thority is overwhelmingly in favor of the proposition that where a bank receives a bill for collection, payable at a distant point, it is so received with the knowledge and implied assent of the depositor that it is to be sent to the point of payment, and when this is done in good faith to a bank in good standing, and according to general usage, the transmitting bank is not liable for the default of the bank or agents to which the bill is sent.

If the bill were sent to a bank or other agent known to the trans-mitting bank to be unworthy of confidence, that would be an act of negligence and carelessness of the interests of the holder, for which it would be held liable. In this case the bill on its face showed that it was payable at the First National Bank at Knox-ville, and the holder knew when it was transmitted to the Louis-ville Bank that it must of necessity be sent to the bank at which it was payable, and authority to so send it must be implied.

The Circuit judge instructed the jury in accordance with the doc-trine laid down in the New York case of *Allen v. Merchants' Bank*, 22 Wend., 215, that a bank receiving a bill for collection and transmitting it to the point of payment is liable to the owner, and that the bank at the point of payment receiving such bill is liable to the bank transmitting to it, and that upon this principle the action was maintainable against the First National Bank by the Louisville Bank, and not maintainable by the Louisville Bank against Brown, who was liable, if at all, to the First National Bank of Knoxville, for negligence in the discharge of a duty intrusted to him by said last named bank.

From the principles announced in this opinion, it follows that the instructions given were erroneous. The First National Bank at Knoxville and Brown were the agents of the Leather Manufactur-ers' Bank, the holder, and liable only to them for their default and negligence.

This is an action on the case for negligence, not a suit upon the

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bill of exchange, and in such case the liability arises from some breach of duty or negligence toward the payee or holder of the bill, and he only can maintain the action, and a voluntary payment by one under no legal liability to pay can give him no right to maintain an action against the negligent or defaulting agent. Story on B. Ex., § 450; *Farmers' Bank v. Owen*, 5 Cr. Ch. 505.

The defendant, First National Bank, asked the court to instruct the jury, that if they found from the evidence that the plaintiff was not the owner of the bill of exchange, but only an agent for collection of the same, and transmission, the plaintiff could not recover. And further, that where the bill is transmitted successively to several banks, and into the hands of a notary, each party is liable to the owner for its own negligence or want of diligence, and is not liable to any agent in the chain of transmission except by special contract.

Without noticing other instructions requested, and which, with the foregoing, were refused, it is sufficient to say that the instructions asked and above cited are in substance such as in the foregoing opinion we have indicated would have been proper.

The result is that the judgment in favor of Brown is affirmed, and against the First National Bank at Knoxville is reversed, and the cause as to it will be remanded for a new trial.

Reversed and remanded.

NOTE BY THE REPORTER.—In *Gueltek v. National State Bank of Burlington, Iowa* Supreme Court, June 18, 1861, 9 N. W. Rep. 338, a foreign bill of exchange, payable in New York, was deposited with defendant, a National bank at Burlington, Iowa, for collection. In the usual course of business it was sent to the correspondent of the bank in New York. Proper protest and demand for payment was not made by the New York bank, and by reason thereof the drawers and indorsers were discharged. The regular course of business, in such cases, was for the bank receiving the paper to forward it to its correspondent at the place of payment for collection, which course of business was well known to the owner of the paper. Held, that the bank in New York was a sub-agent employed by consent of the principal, and that the superior agent, the bank in Burlington, was not responsible for its acts, but the remedy of the owner of the paper was directly against the New York bank. The court said: "But there is conflict in the adjudged cases upon the question of the direct liability of the bank, employed as a sub-agent, to the holder of the paper, for negligence or default in its collection. The preponderance of the authorities strongly supports the conclusion we have just reached in this case. The following cases are to this effect: *Dorchester and Milton Bank v. New England Bank*, 1 Cush. 171; *Fabens v. Mercantile Bank*, 23 Pick. 390; *Laurence v. Stonington Bank*, 6 Conn. 521; *East Haddam Bank v. Scott*, 12 Id. 308; *Hyde v. Planters' Bank*, 17 La. 560; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13; *Ætna Ins. Co. v. Alton City Bank*, 25 Ill. 243; *Stacy v. Dane Co. Bank*, 12 Wis. 620; *Fierman v. Commercial Bank*, 7 How. (Miss.) 648; *Agricultural Bank v. Commercial Bank*, 7 Sm. & M. 592; *Bowling v. Arthur*, 34 Miss. 41; *Jackson v. Union Bank*, 6 Barr. & J. 146; *Citizens' Bank v. Howell*, 8 Md. 580; *Bank of Washington v. Triplett*, 1 Pet. 25; *Mechanics Bank v. Eorp*, 4 Rawle, 384; *Belmont v. U. S. Bank*, 1 Miles, 173; *S. C.*, 4 Whart. 105.

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Daly v. Butchers and Drovers' Bank, 56 Mo. 93; *Smedes v. Bank of Utica*, 20 Johns. 373. The following cases hold that the bank to whom a bill or note is sent for collection by another bank is not the agent of the owner of the paper: *Allen v. Merchants' Bank*, 22 Wend. 215; *Downer v. Madison Co. Bank*, 6 Hill, 648; *Montgomery Co. Bank v. Albany City Bank*, 3 Seld. 459; *Commercial Bank v. Union Bank*, 1 Kern. 203; s. c., 19 Barb. 391; *Ayrault v. Pacific Bank*, 47 N. Y. 570; s. c., 7 Am. Rep. 489; *Indig v. Brooklyn City Bank*, 16 Hun, 300; s. c., 80 N. Y. 100; *Reeves v. State Bank of Ohio*, 8 Ohio St. 465. The court distinguished *Bradstreet v. Everson*, 73 Penn. St. 134; s. c., 13 Am. Rep. 685; *Lewis v. Peck*, 10 Ala. 142; and *Pollard v. Rowland*, 2 Blackf. 23.

See also *First Nat. Bk. of Charlotte v. Lineberger*, ante, 582.

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(8 Baxt. 211.)

Fraud — voluntary conveyance by woman pending marriage treaty.

A secret conveyance by a woman of her property to an insolvent for an inadequate consideration, pending negotiations for her marriage and three days before marriage, is fraudulent as to the husband.*

ACTION to set aside conveyance. The opinion states the case. The complainant had judgment below.

Rogers & Welcker, for plaintiff.

SNEED, J. The bill charges that the complainant became the husband of the defendant, Louisa G. Carmichael, on the 3d day of September, 1871, after a contract of engagement of ten months previous, and that on the second day of the same month and year the said Louisa sold and conveyed a considerable estate, of which she was the sole owner, to the defendant, J. F. Carmichael, by title bond, without notice to complainant, which the bill charges was a fraud upon the marital right of the complainant, and therefore void. The bill prays that the sale be set aside, and that the complainant be put into possession of the property in right of the marriage. The chancellor granted the relief, and the defendant Carmichael has appealed. The theory of the complainant's case is that the defendant Carmichael, being the brother-in-law of the defendant Louisa, and having at the time her implicit confidence, by undue influence and importunity induced her to sell her estate to him, to conceal the fact from the complainant, and thus get pos-

* See *Butler v. Butler* (21 Kans. 521), 30 Am. Rep. 441.

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session of the estate. It appears that at the time of the transaction Carmichael was living with the defendant Louisa, who had for several years been the widow of his brother; that he had the supreme control of her farm and stock, superintending the cultivation of said farm and the raising and sale of the stock, thereby supporting himself and family as well as the said Louisa and her children, and that in all things touching the management of her affairs she was guided and governed by his advice. The complainant and the said Louisa, on the said second day of September, had been under contract of marriage for about ten months, and the fact of betrothal was well known to defendant Carmichael. The defendants, Carmichael and Louisa, resided on the farm of the said Louisa in the county of Loudon, and in the neighborhood of the complainant. The defendant Carmichael had gone into bankruptcy, and the proceedings for his discharge were pending at the time of the sale, and were consummated by his discharge some time afterward. A few days before the marriage the contract of sale was agreed upon between the parties, and on said 2d of September, 1871, the two defendants came to the city of Knoxville, where the terms were reduced to writing and signed by the defendant Louisa. On the 1st of February, 1872, several months after the marriage, the defendant Carmichael caused the title bond to be registered. The complainant was kept in ignorance of all these transactions until some time after the marriage. The land thus sold was worth, as we estimate it from the weight of the proof, between fifteen and twenty thousand dollars, and the personalty about three or four thousand dollars. The conditions of the sale on the part of defendant Carmichael were that he was to assume and pay the debts of the said Louisa, estimated by him to be about \$8,000, but the amount not ascertained, and pay the defendant Louisa \$8,000 in money, \$3,000 of which to be paid to her, and evidenced by a note due — day of —, 1876, and the other \$5,000 to be paid in equal amounts to the two children of the said Louisa, and to be secured by his promissory notes, to be made to the guardian of said children whenever a guardian should be appointed. The article of agreement or title bond is only signed by the defendant Louisa, and the only paper by which the defendant Carmichael is charged is the said promissory note of \$3,000, so executed and payable as aforesaid on the — day of —, 1876. The answer of defendant Louisa admits the facts as charged in the bill, and she

files a cross-bill in the cause, in which she also seeks an avoidance of the contract for the same reasons alleged in the bill. The answer of defendant Carmichael admits the matters of fact as stated in the bill, but denies and disclaims the fraudulent purpose imputed, and asserts its perfect good faith. Without entering into a careful analysis of the proof, it is sufficient to say that in our opinion the theory of the bill is abundantly sustained by the undisputed facts of the case, without reference to the deposition of the defendant Louisa, whose competency as a witness it is, in our opinion, not necessary to determine. The facts of the known existence of the contract of marriage, the secrecy of the sale, its purposed concealment from the complainant, the insolvency of the purchaser, and the suspicious artifice and contrivance of the whole transaction, sufficiently appear from the other proof and surroundings of the case, and the equities of the parties are clearly developed without the aid of the deposition referred to. Do the facts sustain the ruling of the Chancellor? We are of opinion that they do. An argument of much ability is predicated upon the fact that under the contract an ample provision is made for the children of the defendant Louisa, and that her betrothed husband, himself a man of good estate, while he takes her unincumbered with property, takes her also unincumbered with her debts. This argument might be of more force if the children were made absolutely secure of the alleged provision, and if the complainant was absolutely indemnified against liability for the debts of the wife for which his liability began with the marriage, and will continue until discovery. The creditors of the defendant Louisa were not consulted touching the arrangement, nor is there the slightest privity of obligation as between them and the defendant. On the other hand, the defendant Carmichael, a bankrupt, has got possession of this large estate upon an indefinite parol promise to pay five thousand dollars at some indefinite time to the children, and a parol promise to pay vendor's debts at a period of time equally indefinite, and a written promise to pay the defendant Louisa three thousand dollars in 1876, and has thus put himself in a condition not only to use the rents and profits of the estate for his own advantage, and for a paltry consideration for an indefinite time, but to defy the creditors, and to throw the burden of satisfying their demands upon the complainant by the quick remedial energies of the law, to which the creditors have a right to resort upon the in-

stant of the marriage, rather than the slow and dubious process of a court of equity to enforce a doubtful trust.

It seems to be settled by the adjudged cases in this State that every such transaction by a woman pending a treaty of marriage is not necessarily fraudulent and void because the intended husband was not a party or privy thereto, but that each case must be judged by its own circumstances. Thus if a conveyance be made by a woman in the discharge of the moral duty of providing for the children of a former marriage, it will not be considered as a fraud upon the intended husband, though it had been concealed from him. 1 Col. 409. And in *Jordan v. Black*, it was said that the meritorious object of the conveyance, or the situation of the intended husband in point of pecuniary means, would form exceptions to the rule. Whether there is fraud or not upon the marital rights must depend upon the circumstances of each case, the conveyance of a married woman, though made immediately before marriage, being *prima facie* good. *Lawden v. Harris*, 1 Head, 203. In the case of *Logan v. Simmons*, 3 Red. Eq., 487, RUFFIN, C. J., discusses this question with his wonted ability, tracing the doctrine down from the fountains of the English common law. The exact point adjudged in that case was that when a woman, who was about to be married, made a voluntary conveyance of all her valuable property, on the day before the marriage, without the assent or knowledge of her intended husband to her son by a former marriage, and it was agreed that this conveyance should be kept secret, it was held that a court of equity would consider it a fraud upon the rights of the intended husband, and declare it void as to him. But the question, says Mr. Tapping Reeve, in all these cases is was the husband deceived and disappointed? It seems to me, he adds, that such deception may be practiced by concealment. Reeve Dom. Rel. 284. The idea seems to pervade all the authorities that such a conveyance, though *prima facie* good, must be judged by its own particular surroundings, and that a purposed concealment is evidence of a purposed fraud. Thus said Lord THURLOW in the leading case of the courtship of *Strathmore v. Bowes*, 1 Ves. Jr. 22, "a conveyance by a wife, whatsoever be the circumstances, and even the moment before the marriage, is *prima facie* good, and becomes bad only on the imputation of fraud. If a woman, during the course of a treaty of marriage with her, makes, without notice to her intended husband, a conveyance of any part of her property,

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I should," said Lord THURLOW, "set it aside, though good *prima facie*, because affected by fraud." The case in judgment, in our opinion, presents a stronger case for the application of the principle than either of those cited. And the principle itself is founded in the most enlightened sense of justice and right.

The complainant in this case was a man of substance, not shown to be an unsafe depository of the interests of his intended wife and her children. He was bound for his wife's debts from the moment of the marriage, and so continued during the coverture. She might, by a debt contracted a moment before the marriage, have absorbed his whole estate. She is possessed of a good estate which three days before the marriage she has alienated to the defendant upon a consideration which seems to us shadowy and doubtful, and the fact is studiously concealed from him. Certainly such a case appeals strongly and eloquently to a court of equity.

Decree affirmed.

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(8 Baxt. 283.)

Municipal corporation — unreasonable ordinance — sale of spirituous liquors.

A town ordinance prohibiting licensed retailers of spirituous liquors from selling such liquors between 6 o'clock P. M. and 6 o'clock A. M., is unreasonable and invalid. (See note, p. 703.)

The opinion states the case.

NICHOLSON, C. J. The question in this case is, whether an ordinance of the town of Greenville, forbidding licensed retailers of spirituous liquors to sell between the hours of 6 o'clock P. M. and 6 o'clock A. M. is valid, as a reasonable exercise of the police powers of the municipal corporation?

It was decided in *Smith v. Knoxville*, that an ordinance of Knoxville, forbidding the sale of liquors by retailers after 9 o'clock P. M. was valid, and in *Maxwell v. Jonesboro, MS.*, that an ordinance restraining retailers from selling after dark, was valid.

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In both of these cases it was held that it must be left to the corporate authorities to determine what restrictions are required upon the trade of retailers of liquors for the general good, and unless they are unreasonable and oppressive, they are valid and will be maintained.

The only question, therefore, open in this case is, whether the ordinance prohibiting the sale of liquors between the hours of 6 o'clock P. M. and 6 o'clock A. M. is invalid because oppressive ?

The State recognized the retail trade in liquors as legal, on condition that the retailer pays for the privilege and procures a license. This license confers upon him the right to sell for one year, subject of course to the general laws of the State, declaring it unlawful to sell on specified days and at specified places. With these exceptions the retailer has the authority of the State to follow his trade, day or night, for a year. How much of this time can he be forbidden to devote to his trade by the exercise of the police powers of a municipal corporation, without an unreasonable or oppressive infringement of his right? We have seen that it has been held that a limitation of the exercise of his right to daylight is not unreasonable or oppressive. In view of the peculiar nature of the trade, there is sound reason in prohibiting its exercise during the night time. But what is there in the trade which makes it necessary, for the preservation of good order and quiet, that it should not be carried on for two hours before dark and for two hours after daylight? It must be borne in mind that a municipal corporation has no power, under the pretext of a public regulation, to prohibit the exercise of a right conferred by the State. Whenever this is done, and to whatever extent, the prohibition, merely as a prohibition, is unreasonable, oppressive and invalid. The only reason which we can see for restraining the trade for two hours before dark, and for two hours after daylight, is simply for the purpose of prohibition to that extent. The reason may be a sound one when viewed simply as a prohibitory measure ; it might be equally sound if the prohibition was total and absolute. But the State has virtually forbidden a municipal corporation to exercise its police powers for purposes of prohibition merely. To be legitimate the prohibition must be so restricted as not to interfere unreasonably or oppressively with the rights conferred by the State. We are of opinion that a prohibition which deprives a party of several hours of daylight, in which

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he is forbidden to exercise a right conferred by the State, is unreasonable and oppressive.

It follows that the judgment of the Circuit Court was erroneous and must be reversed.

Judgment reversed.

NOTE BY THE REPORTER. — In *Grille v. Mayor, etc.*, 8 Baxt. 247, the same was held by an ordinance prohibiting such dealers from selling on court days, or on days when any fair or public show is held, or on the days of college commencement.

The following ordinances have been held unreasonable and invalid: To require a railroad company to keep a flagman by day and a red lantern by night, at an ordinary street crossing; *Toledo, etc., R. Co. v. City of Jacksonville*, 67 Ill. 87; s. c., 16 Am. Rep. 611. Prohibiting the sale, without license, of lemonade at a temporary stand; *Barling v. West*, 29 Wis. 307; s. c., 9 Am. Rep. 576. Requiring druggists to furnish quarterly statements showing kinds and quantities of alcoholic liquors sold, and to whom; *City of Clinton v. Phillips*, 58 Ill. 109; s. c., 11 Am. Rep. 52. Exactng a fee of five cents for every sale of hay or other produce within the city; *Kip v. City of Paterson*, 26 N. J. L., 298. Prohibiting a gas company from opening a paved street for the purpose of connecting houses with their main; *Comm'rs v. Gas Co.*, 12 Penn St. 318. Requiring owners of theatres to pay the city constable two dollars for every night of his attendance at public performances therein; *Waters v. Leech*, 3 Ark. 110. For the arrest and confinement in the caboose over night of all free negroes found out after 10 o'clock; *Mayor v. Winfield*, 8 Humph. 707. Requiring a license fee from hucksters; *Dunham v. Trustees*, 5 Cow. 462. Prohibiting auctioneers to sell after sundown; *Hayes v. City of Appleton*, 24 Wis. 543. Forbidding the sale, without a license, at temporary stands, of lemonade, ice cream, cakes, pies, cheese, nuts or fruits; *Barling v. West*, 29 Id. 307. Subjecting non-resident owners of estrays to a penalty; *Town of Marietta v. Fearing*, 4 Ohio, 437. Forbidding cattle, swine and horses from running at large in streets, unless such ordinance is specially authorized by charter; *Clinton v. Hatch*, 18 Ohio, 522. Prohibiting sale of beer, ale or other intoxicating liquors, in a less quantity than twenty-eight gallons at one time, unless specially authorized by statute. *Com. v. Turner*, 1 Cush. 498. Inflicting a penalty for selling pressed hay without inspection, such sale being tolerated by statute; *Mayor v. Nichols*, 4 Hill, 209. Authorizing police officers to make arrests, without warrant, for breaches of ordinances not committed in their presence; *Petersfield v. Mayor, etc.*, 3 Cold. 305. Exactng that all slaughtering shall be done for a certain period at a certain building, the owners of which shall be paid a fixed price for the privilege by those slaughtering; *City of Chicago v. Bumpff*, 45 Ill. 90. Forbidding porters, runners, hackmen, draymen, expressmen, omnibus agents and drivers, from approaching within 20 feet of any wharf or depot on the arrival of any steamboat or train, unless requested by a passenger; it being shown that such approach was arranged for by agreement between a railroad and an omnibus company; *Nafman v. People*, 19 Mich. 352. Forbidding any but inhabitants of the city to take fish in a navigable river within the city limits; *Hayden v. Noyes*, 5 Conn. 391. Forbidding sale of goods on Sunday, but allowing it by Jews; *City of Shreveport v. Levy*, 25 La. Am. 671; s. c., 21 Am. Rep. 553. Punishing the wanton injury of private shade trees; *Goshes v. Cary*, 58 Ind. 268. Granting a franchise to build and maintain a toll-bridge across a river flowing through a city; *Williams v. Davidson*, 43 Tex. 1. Requiring milk-dealers to pay a license fee for each cart run by them; *Chicago v. Bartree*, Ill. App. Ct. Jan. 1882. Prohibiting farmers, gardeners, etc., from selling vegetables grown by them, in the streets, without license; *City of St. Paul v. Trager*, 25 Minn. 248; s. c., 23 Am. Rep. 462.

The following ordinances have been held reasonable and valid: Fixing the price at which private citizens may tap public sewers; *Fisher v. Harrisburg*, 2 Grant, 291. Prohibiting carriages from standing in a street more than fifteen minutes, in connection with a police regulation that a space of thirty-five feet about the door of a particular place of public entertainment must be kept clear; *Com. v. Robertson*, 5 Cush. 422. Subjecting every dog-owner to a fine of \$100 for the biting of any person by his dog outside the owner's

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inclosure; *Com. v. Steffee*, 7 Bush, 161. Levying a tax of \$150 on every retailer of spirituous liquors; *Mayor v. Beasley*, 1 Humph. 333. Prohibiting restaurants to be kept open after 10 o'clock at night; *State v. Freeman*, 38 N. H. 436. Prohibiting awnings before doors, unless authorized by mayor and aldermen; *Pedrick v. Bailey*, 13 Gray, 161. Prohibiting the removal of sand, stone or earth from the lake shore within 100 feet of high water mark; *Clason v. City of Milwaukee*, 30 Wis. 316. Forbidding the driving of horses on a trot or gallop in the streets; *Com. v. Worcester*, 3 Pick, 468. Compelling boats with damaged corn or putrid substances on board, or coming from any place infected with malignant or contagious disease, to anchor in the middle of the river, and not to land until examined by the city physician; *Dubois v. City Council of Augusta*, Dud. 30. Forbidding keeping more than 56 pounds of gunpowder, and requiring it to be kept in tin or copper, under penalty of \$50 to \$500; *Williams v. City Council of Augusta*, 4 Ga. 509. Making it a penal offense to sell spirits in quantities of a quart or more to be drunk on the premises where sold, when inconsistent with the State law; *Adams v. Mayor of Albany*, 39 Ga. 56. Fixing a retailer's liquor license fee at \$500; *Perdue v. Ellis*, 18 id. 586. Forbidding keeping open a confectionery on Sunday after 9 o'clock A. M.; *City of St. Louis v. Ciferata*, 24 Mo. 94. For punishing vagrants; *City of St. Louis v. Bentz*, 11 id. 61. Compelling closing of dram shops at 9 o'clock P. M.; *Smith v. Mayor*, 3 Head. 245. Making it penal to sell goods on Sunday; *City Council v. Benjamin*, 3 Strobb. L. 508. Making it penal for unlicensed retail grocers to have spirituous liquors on their premises; *City Council v. Ahrens*, 4 id. 241; *Heisenbrittle v. City Council*, 2 McMull. 238. Authorizing commissioners to vacate leases of market stalls; *City Council v. Goldsmith*, 3 Speer, 423. To close dram shops from 10.30 P. M. to 5 A. M.; *State v. Welch*, 36 Conn. 215. Prohibiting swine running at large; *Com. v. Patch*, 97 Mass. 231; *Com. v. Bean*, 14 Gray, 53. Prescribing certain streets as route for travel of omnibuses and hacks, and excluding such vehicles from other streets; *Com. v. Stodder*, 3 Cush. 582. Prohibiting the employment of any but a licensed person in removing offal and house dirt from a city; *Vandine, Pettitioner*, 6 Pick. 187. Requiring license in order to sell certain commodities in certain streets; *Nightingale, Pet'r*, 11 id. 168. Forbidding new burial grounds within a city; *City Council of Charleston v. Baptist Church*, 4 Strobb. L. 306. Requiring butchers to be licensed and to pay \$300 therefor; *St. Paul v. Coulter*, 12 Minn. 41. Forbidding obstruction of street cars by other vehicles; *State v. Foley*, 31 Iowa, 627; s. c., 7 Am. Rep. 166. Taxing vehicles hauling into and out of a city, under a statutory authority to tax vehicles used within the city; *City of St. Charles v. Noble*, 51 Mo. 122; s. c., 11 Am. Rep. 440. Permitting the closing of a draw bridge across a navigable river in a city every ten minutes for the passage of persons and vehicles, and forbidding any attempt by navigators to pass the draw when so closed; *Chicago v. McGuin*, 51 Ill. 206; s. c., 295. Forbidding wagons loaded with perishable produce to remain in streets within limits of a market more than twenty minutes between 11 A. M. and 4 P. M., unless permitted by superintendent of market; *Com. v. Brooks*, 109 Mass. 365. Compelling hackmen, etc., to observe the orders of the police as to the stands which they and their vehicles may take while waiting for employment near any railway station; *City of St. Paul v. Smith*, Minn. Sup. Ct., Dec. 1880. Imposing a license tax on vehicles using the streets, and a fine for disobedience. *City of St. Louis v. Green*, 70 Mo. 523. An ordinance authorizing the mayor to grant licenses "to such persons as in his judgment shall appear proper and best calculated to secure to the inhabitants of the city pure and wholesome milk," and prohibiting the sale of milk by others in the city, and making unauthorized sale a misdemeanor. *People ex rel. v. Mulholland*, 33 N. Y. 394.

COOPER V. STATE.

(3 BART. 334.)

Criminal law — assault — whipping minor servant.

A master has no implied authority to whip a minor servant hired to him by his father.

CONVICTION of assault and battery. The opinion states the case.

DEADERICK, J. Cooper and Knox hired a negro boy, aged seventeen, from his father to work in a brick yard. He neglected his work, and Cooper chastised him with a stick, and the defendants, Lit. Howard and William Howard, held the boy while Cooper was chastising him.

They were indicted and convicted of an assault and battery in the Circuit Court of Roane county, and have appealed in error to this court. Exceptions are taken to the charge of the court in the instruction to the jury, as well as in his refusal to instruct as requested by defendants' counsel. The instructions given were, in substance, that the master might moderately and reasonably correct, by corporal chastisement, his apprentice, the school-master his scholar, or minors to whom he stood in *loco parentis*; or when a minor was hired by his father, he, the father, might delegate his authority thus to punish his minor child, to the hirer.

But the court refused to charge that the hirer might inflict corporal punishment upon a minor hired to him by his father, for disobedience or neglect of his work, or insolent behavior, unless he had received permission or authority to do so by his parent. We are of opinion that there was no error in the charge as given, and none in refusing to charge as requested.

Judgment affirmed.

NASHVILLE AND CHATTANOOGA RAILROAD CO. V. SPRAYBERRY.

(8 Baxt. 341.)

Carrier — of passengers — connecting line — action for personal injury.

A passenger by railway, purchasing a ticket over the line of the seller and connecting lines, and injured by the negligence of one of such connecting lines, cannot maintain an action therefor against the seller. (*See note, p. 706.*)

ACTION of damages for death of plaintiff's wife and children. The opinion states the case. The plaintiff had judgment below.

E. N. Dodson, for defendant.

McFARLAND, J. Sprayberry purchased from an agent of the Nashville & Chattanooga R. R. Co., at Chattanooga, tickets for himself, wife and two children from that place to Shreveport, La. The tickets are what are known as coupon tickets, and indicated the route to be by the Nashville & Chattanooga road to Nashville, and by other connecting roads to Memphis, and from that point to Shreveport by steamboat. After passing over the railroads to Memphis the party took the steamboat called the Nick Wall, to which they were directed, and while on the route on the Mississippi river an accident occurred in which the wife of Sprayberry and his two children were drowned. This action was brought by Sprayberry against the Nashville & Chattanooga R. R. Co. The drowning is averred to have been the result of the misconduct and want of skill of the officers and servants of the boat.

[Omitting a minor point.]

The next question, and one of importance, is as to the liability of the Nashville & Chattanooga Railroad Company for injuries to the passengers caused by the wrongful acts, negligence, or want of skill in the officers and servants of the steamboat after the passengers had passed beyond their line. The declaration avers that the defendant was in partnership with the company or line of carriers owning the boat. This was put in issue. The judge, in his charge, instructed the jury in substance that it was not necessary for the plaintiff to prove this to entitle him to a recovery, but if the plaintiff purchased the tickets from an authorized agent of the defend-

ant, the defendant thereby became bound for the transportation of the passengers over the entire line for which the tickets were sold, although beyond the terminus of its road; that the company selling the tickets incurs a responsibility as though the entire route was its own, unless it stipulated at the time for a less responsibility. This we understand to be the substance of the instructions to the jury on this question. This doctrine rests upon the theory that the contract is alone with the company from whom the tickets were purchased for the entire route, and that the connecting lines are but agents of the first in carrying out this contract, and as a consequence the acts or negligence of the servants causing the injury are the acts of the joint company. This is laid down as the true doctrine in *Shearman & Redfield on Negligence*, § 272, though it is conceded that the American cases do not always support it. The cases referred to in support of the position we have not had an opportunity to examine.

In the case of *Carter v. Peck*, 4 Sneed, 203, the language of the judge delivering the opinion of the court seems to favor this view. In that case, however, it appeared that the plaintiff purchased from the defendants, the proprietors of a stage line, through tickets from Nashville to Memphis; the defendants did not own the entire line, but had an arrangement with another company owning a stage line to receive the passengers at Waynesboro on the route and carry them to LaGrange for their share of the fare, from which point they were to be taken to Memphis by railway, but this arrangement was not known to the plaintiff. The connecting line at Waynesboro failed and refused to carry the plaintiff, and he was compelled to pay his fare upon another route. It was held that the plaintiff was entitled to hold the first company liable for this failure upon the ground that his contract was alone with them.

The case of *Frustenheim v. Memphis & Ohio R. Co.*, decided at Jackson by this court in April, 1872, was this: The plaintiff purchased a through ticket from New York to Memphis from the Pennsylvania Central Railroad Company, and received a check for his baggage, to be delivered at Memphis. It was held that upon this the plaintiff could not recover from the last company running into Memphis for an injury to his baggage, which occurred while on the Pennsylvania Central road; for this injury he must look to that company. We are also referred to several cases, and one of them our own holding, that a carrier receiving freight to be carried

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beyond the terminus of its own road is responsible for its delivery at that point unless a different liability is stipulated for, and these are as stated authorities holding that the same rule applies to passengers.

On the other hand, there are authorities holding that a different rule applies to passengers from the rule applicable to freight and baggage. That where tickets of this character are sold they are to be regarded as distinct tickets for each road sold by the first company as agent of the others, so far as passengers are concerned. This is the doctrine maintained by Judge REDFIELD in his work on Carriers. He refers, among others, to the case of *Ellsworth v. Tartt*, 26 Ala. 733, in which he says the question was a good deal examined, and the rule laid down to be, "If the proprietors of different portions of a public line of travel, by an agreement among themselves, appoint a common agent at each end of the route to receive the fare and give through tickets, this does not of itself constitute them partners as to passengers, so as to render each one liable for losses occurring upon any portion of the line." He refers also to other authorities. See Redf. on Carriers, § 444. And the same author maintains the same doctrine in his work on the Law of Railways, vol. 2, § 201.

In this conflict of authority we are left to adopt the rule which to us seems supported by the soundest reason.

The extent and *termini* of great railway lines, owned and operated by companies incorporated by public laws, may be supposed to be known, at least in general, to persons of ordinary intelligence when they purchase tickets to travel over them, especially when this is shown by the tickets themselves. The system of selling through tickets is one of great importance and convenience to travelers, as it avoids trouble, besides securing in some instances lower rates. The theory that the company selling the ticket shall be held from this alone to have actually contracted to carry the passengers over roads besides its own, and that the owners of the other roads are but the agents of the first to carry out the contract, seems to us to be an arbitrary assumption, a sort of legal fiction, and contrary in some cases, at least, to the truth of the case. Assuming that in fact the different lines of road are separate and distinct, and owned and controlled by different companies, with different agents and officers, and that there is no contract or privity between them in regard to carrying passengers, except the arrange-

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ment to sell through tickets, and that these facts appear in proof, shall the fact that the first company, with the authority of the others, issues and sells the tickets, be held of itself to establish exactly contrary to the truth, that the other companies are but the agents and servants of the first? There is nothing in this record to indicate that the officers and agents of the steamboat, whose wrongful acts or negligence are said to have caused the death of the plaintiff's wife and children, were the servants of this defendant or in any manner under its control, except the simple fact that the defendant sold the tickets. To allow this of itself to establish this arbitrary conclusion against the truth, would be to attach unjust responsibility upon the company selling the tickets. We are of opinion that in such cases the company selling the ticket shall be regarded as the agent of the other lines when the tickets themselves impart this and nothing else appears, and the purchaser may well understand with whom the contract is made, and who is bound for its performance.

Of course the company selling the tickets may, by contract, either expressed or to be fairly implied from its acts, bind itself to be responsible for the entire route; but this should not be held conclusively established from the sale of the tickets alone, nor should it be held to throw upon the defendant the onus of proving that it expressly limited its liability. If a partnership in fact appear, the case would be different.

For this error the judgment must be reversed, and a new trial awarded.

Judgment reversed.

NOTE BY THE REPORTER.—The doctrine of the principal case was held, two judges dissenting, in *Hood v. New York and New Haven Railroad Company*, 28 Conn. 1. In this case the railroad company advertised that at certain points on their line, stages would leave for certain other points. But a single ticket was issued, which was inscribed, "N. H. to C., by stage from F." The court remarked: "Nor does the fact that separate tickets may be taken at first, as is sometimes done, for each portion of the route, or one entire one, specifically embracing a ticket for each portion, sit up for that purpose so that the attachment is very slight, make any difference. We are confident that these different modes of doing the same thing do not prove different contracts between the parties. In all, the single or separate payments are only payments, and nothing else." The court distinguish between the case of freight and that of passengers, saying, "passengers take care of themselves." "The public are interested in holding each individual through out the route to be *principals*, liable as common-carriers on their respective roads. Not is it true, nor has it ever been understood to be so, that paying the money at once, of necessity proves an intention to change the character of the intermediate companies, or to exempt them from their usual liabilities. One pays his fare before taking his seat; another when called upon; another pays each company as he travels on; another pays and takes

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no ticket. Are not all to be treated alike? Do not all enjoy the same privileges and immunities? And is not each company liable for the negligence of its agents? Between Montreal and New York there are some six railroad companies and one or more steamboat companies on Lake Champlain. Does any one dream that the persons just alluded to, paying at different places, pass on these roads and on the lake under different securities?"

The same was held in *Ellsworth v. Taritt*, 26 Ala. 733, as to loss of baggage. The court distinguished *Bostwick v. Champion*, 11 Wend. 572, 18 id. 175, on the ground that there was in that case of community of interest in the entire fare. They observe, "Suppose the different proprietors along the route came to the understanding to appoint a common agent at each end, to receive the fare of each, from passengers going through, and to give a receipt or through ticket; it is very clear that such agreement would not constitute a partnership *inter se*, or as to third persons, and yet each proprietor would have the right to receive his proportion of the fare."

In *Sprague v. Smith*, 29 Vt. 421, the court, by REDFIELD, J., said: "But in regard to carrying passengers the rule is different, we apprehend. These through tickets, in the form of coupons for each successive company, which are purchased of the first company, import no contract ordinarily to carry the passenger beyond the line of the first company, so far at least as they are concerned. The baggage of passengers may come under the same rule in regard to conveying beyond the first company's line which freight does, as the same general liability exists. But through passenger tickets are to be regarded as distinct tickets for each road, and unless the road check baggage through it is questionable, perhaps, how far they are liable for losses beyond their own limits. And the contract between the companies which commonly exists in regard to the division of the price of the through ticket constitutes no such partnership, probably, as will render each company liable for the whole route. The first company is in such case looked upon as the agent of the other companies for selling their tickets, and the contract requires no different construction from one where the tickets of one company are sold at the stations of other companies." Citing 23 Conn. and 26 Ala., *supra*: "We do not perceive that this rule of liability could make the carrier of passengers liable for the act of a party over whom he has no control." "He cannot be regarded as liable, we think, for all the acts of all the operatives of the companies over whose lines he carries the plaintiff, unless some connection between the roads of a character similar to that of general partnership, or the consolidation of their interests in the carrying business, is shown."

The same was held in *Stratton v. N. Y. & N. H. R. Co.*, 2 E.D. Smith, 184, as to the loss of baggage, retained by plaintiff in his own custody until he arrived at the defendant's terminus. The court said: "There is nothing in an arrangement like this to constitute the different companies partners for the transportation of passengers or baggage so as to render the defendant liable in common with the others for the loss of this valise. The arrangement may be beneficial to them as well as to the public, inasmuch as by facilitating travel it may tend to increase it; but that would not create that joint interest, that community in profit and loss which is essential to the existence of a partnership." Distinguishing *Champion v. Bostwick*, 18 Wend. 175.

In *Knight v. Portland, etc., R. Co.*, 56 Me. 234, it was held, without discussion, but citing the cases in 9 Cush., 29 Vt. and 22 Conn., that such through tickets are to be regarded, as to passengers, "as distinct tickets for each road, sold by the first company as agent for the other companies." The question was not involved, however, in the case in 9 Cush. 24 (*Schuyman v. Boston & Worcester R. Co.*), for that was an action against the last carrier, and on whose road the injury occurred, and the court expressly declined to pass on the question of the liability of the carrier selling the through ticket. It was also held that the fact that the passenger was on a through car made no difference. The doctrine of the principal case was held in *Hartan v. Eastern R. Co.*, 114 Mass. 44.

The same doctrine was held in *Briggs v. Vanderbilt*, 19 Barb. 222. The court said: "There is a general understanding between the different railroads in the country which connect together, as to their times of arrival and departure, and the routes are frequently advertised as forming one line; but so long as they continue disconnected as to the profits and losses of transportation, and each has or bears its own, there is no partnership, and neither is responsible for the engagements of the other." "They had, it is true, the same agent, but he acted in his vicarious capacity separately for each."

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Minor v. N. Y. & N. H. R. Co., 53 N. Y. 363, was an action for loss of baggage. The baggage was checked by defendant with a check of the connecting company, and a coupon ticket was issued. The baggage was destroyed while in possession of the second company. It was held that defendant was not liable. In *Kessler v. N. Y. C. & H. R. R. Co.*, 61 N. Y. 538, the action was for loss of baggage, the defendant being the last of the connecting roads. In the absence of proof that the baggage came into its possession it was held not liable. Here the check was stamped in the name of all the roads.

In *Croft v. B. & C. R. Co.*, 1 MacA. 493, the first carrier, receiving through fare and checking baggage through, was held liable for the loss of the baggage on any of the connecting lines. The like was held in *Illinois Central R. Co. v. Copeland*, 24 Ill. 332. This is founded on the English doctrine relative to goods. The tickets in this were three, all headed in defendant's name, the first from Chicago to St. Louis, and the second from Chicago to Mattoon; it recited the payment of fare to the defendant, and the only indication of the intervention of any other company was the use of the words "via the Terre Haute and Alton Railroad," on the third ticket from Mattoon. The check was stamped "Chicago to St. Louis." The court say this implies a special undertaking of the defendant to carry from Chicago to St. Louis. This seems to come within the rule of the English cases of through tickets hereafter cited, and of *Quimby v. Vanderbilt*, *infra*.

The court said that the guaranty evidenced by the tickets and check was one of safe carriage of person and baggage by defendant from Chicago to St. Louis, the latter place "by means of our connection with the Terre Haute and Alton Railroad," being "the terminus of our road." "You having no farther care or concern about it whether we run our own cars through, or take those of the other road at the point of intersection." In *Chicago & Rock Island R. Co. v. Fahy*, 59 Ill. 81; s. c., 4 Am. Rep. 587, it was held that such an action as the last could be maintained against any company of the connecting line on whose line the baggage is shown to have been lost.

In *Quimby v. Vanderbilt*, 17 N. Y. 306, the defendant owned steamships plying between New York and Nicaragua, but he advertised "Vanderbilt's line between New York and San Francisco," the advertisements being signed by his agent, and this agent sold three tickets, one from New York to Nicaragua, one thence across the isthmus, and one thence on a particular vessel to San Francisco, for a gross sum, delivering with them a card signed by him and describing the route, and stating that passengers were speedily conveyed across the isthmus by the Nicaragua transit. Held, that this authorized a finding of a contract by defendant, as principal, for through transportation. This was founded on English cases.

In *Champion v. Bostwick*, 18 Wend. 175, three persons ran a line of coaches from Utica to Rochester, the route being divided between them into three sections, the occupant of each section furnishing his own vehicles and horses, furnishing drivers, and paying the expenses of his section, but fares for passage were divided between them in proportion to the number of miles run by each. Held, that they were jointly liable for an injury to a passenger by the negligence of one. The chancellor distinguished such a case as the principal case.

In *Baltimore & Ohio R. Co. v. Campbell*, Ohio Supreme Court, April, 1881, it was held that where it is necessary for a traveller in going from one place to another to pass over the connecting lines of several railroad companies, it is competent for either company to contract with him for the transportation of himself and baggage the whole distance, or that its liability shall be confined to loss or damage occurring on its own road; but the collection by such contracting carrier of fare in advance for the entire journey, without agreement as to risks, renders it liable, on receipt of such traveller's baggage, to transport it safely to the end of the route, and there deliver it, on demand, to such owner. This was held, without extended consideration, upon the authority of the text-book writers. Schouler, Thompson, Lawson and Hutchinson.

In *Great Western Ry. Co. v. Blake*, 7 H. & M. 967 (Exch.), the defendant sold the plaintiff one ticket for one fare from P. to M. Defendant's line terminated at G., and thence to M. the line was owned by the S. W. Ry. Co. By arrangement the lines were worked and the fare apportioned between the two companies. The plaintiff was conveyed in the same car from P. on to the line of the S. W. Ry. Co., and there came into collision with a locomotive left on the track by the servants of the latter company. There was no

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negligence on the part of the driver of the train. *Held*, that the defendant was liable. COCKBURN, C. J., thought the English rule as to goods prevailed as to passengers, and said: "If a railway company chooses to contract to carry passengers, not only over their own line, but also over the line of another company, either in whole or in part, the company so contracting incurs all the liability which would attach to them if they had contracted solely to carry over their own line." The defendant "became responsible for the safety of every passenger throughout the distance for which they gave him a ticket, just as if they had conveyed him on their own line." This was followed in *Thomas v. Rhymney Ry. Co.*, L. R., 5 Q. B. 226. The cases were alike, except that in the latter the defendant paid tolls to the second company. MILLER, J., thought "that the defendants ought not to be liable, and that a railway company can only be held responsible for the negligence of those over whom they have control." LUSH, J., thought the distinction between the two cases material. But the court yielded to the authority of the Exchequer decision, and to that of *Buxton v. N. E. R. Co.*, L. R., 3 Q. B. 549, which was like the *Blake* case. The *Thomas* case was affirmed by the Exchequer chamber, L. R., 6 Q. B. 226. These English cases are of course distinguishable on the ground of a single and complete contract for the whole route by the first company. They are not the case of separate contracts for the several divisions of the route, made by the common agent. In the last case the court said, by KELLY, C. B.: "The contract with the passenger is for the reasonably safe conveyance of the passenger from one end of the journey to the other." "They perform some part of the contract by means of contracts or arrangements with other persons." See, also, *Faulkes v. Metropolitan Ry. Co.*, 5 C. P. D. 157; *Hooper v. London & N. W. Ry. Co.*, 43 L. T. (N. S.) 870.

See *Hawley v. Scriven*, ante, p. 126.

COLLIER V. LATTIMER.

(8 BART. 420.)

Exemption — head of family — widow, when

A widow remained upon her husband's farm and carried it on for eleven years after his death, as her only means of support. Her children were married and had left her. She rented the farm and stock, reserving and occupying for herself one room in the house. *Held*, that she was entitled to the benefit of the exemption law, as the head of a family engaged in agriculture.*

REPLEVIN. The opinion states the case. The plaintiff had judgment below.

McAdoo & Lanier for plaintiff.

Allen & Shackelford for defendant.

DEADERICK, J. Collier, a constable of Humphreys county, levied an execution upon and took in his possession a horse, and cow and calf, as the property of defendant. She replevied the animals,

*See *Callison v. Williams* (32 Gratt. 15), 34 Am. Rep. 750.

and upon an agreed state of facts, submitted to the judge of the Circuit Court of Humphreys county, he decided in favor of said Naomi, and Collier appealed to this court.

The facts agreed are, in substance, that the levy was valid and the seizure lawful, unless the property was exempt from execution, as being the only property of the kind owned by said Naomi. It was also agreed that defendant was a widow, whose husband had been dead eleven years; that she had children, but they were, at the time of the levy, all of full age, and had married and left their mother, leaving her living on the place or farm where she had resided at the time of and ever since her husband's death, he being the owner of the farm at the time of his death, and that she had cultivated the farm every year since her husband's death up to the time of the levy; and that she is still living on the place, occupying one room for herself, which is rented out for the present, and the horse seized was, by her contract, to be used in making the crop; that the farm was her only means of subsistence, and the contract for renting was made when the property was seized; that none of her children lived with her, and fifteen days before the levy her brother, who had lived with her a few months, left her, and she had no family at the time of the levy but herself. Upon the death of the husband the exempt property belonging to him is likewise exempt in the hands of the widow for her own benefit if there be no children, or for their joint benefit if there are children. Code, § 2288. By § 2112 the same provision is made in favor of the wife whose husband absconds. It is next shown that any of the property in controversy belonged to the husband of defendant at the time of his death.

But these provisions are cited as showing the policy of the statutes upon the subject of exemption to give the widow its benefits, even if there be no children; and all these exemption laws, it has been often held by this court, are to be construed together as different parts of one act, and are to receive at the hands of the courts a broad and liberal construction, so as to favor the remedy intended by the legislature. Accordingly, it has been held that a widowed daughter, residing with her father, and eating at the same table, whose children also lived with her at her father's, and cultivated part of his farm, was the head of a family within the meaning of the exemption laws. *Bachman v. Crawford*, 3 Humph. 213.

Upon like reasons, and for similar purposes, it has also been held

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by this court, in a recent case, that a jackass is a horse within the meaning of said acts. *Vincent v. Vincent*, 1 Heisk. 333.

In the case cited in 3 Humph. referring to a New York case upon a statute similar to ours, this court said that a man thirty-five or forty years old, residing with his step-mother, having no wife nor children, was not a householder, because he had no family, had no control of the house, and consequently could not be a householder. But in this case, although defendant had no children living with her at the time of the levy, she had control of the house, as she had had ever since the death of her husband, and as before the children grew up and left her, and was a housekeeper, and the head of her establishment, engaged in agriculture for her support, and falls within the spirit and meaning of the acts exempting certain articles of personalty from execution in hands of heads of families engaged in agriculture, and we think the judgment of the Circuit Court was correct, and affirm it.

Judgment affirmed.

JONESBORO, ETC., TURNPIKE CO. V. BROWN.

(8 Baxt. 490.)

Mandamus -- governor.

Mandamus will not lie against the governor.*

APPPLICATION for mandamus. The opinion states the case. The writ was denied below.

McFARLAND, J. This was an application to the judge of the Circuit Court of Davidson county for a mandamus to compel the then governor, John C. Brown, to issue certain bonds of the State, which it is claimed the legislature, by certain acts, had directed to be issued to the Jonesboro, Fall Branch & Blair's Gap Turnpike Company.

We refer to and adopt the opinion of the Circuit judge, Baxter,

*See references, 27 Am. Rep. 637, and *State v. Warmouth* (24 La. Ann. 351), 13 Am. Rep. 126, and note, 128; *People v. Governor* (29 Mich. 320), 13 Am. Rep. 89, and note, 96. To same effect, *Western R. Co. of Minnesota v. DeGraff*, Minn. Sup. Ct. July 12, 1890.

which sets forth the substance of the various acts of the legislature, with perhaps one exception, that does not materially affect the question. In that opinion the conclusion is reached that upon a proper construction of these acts, the petitioner is not entitled to any of the several series of bonds claimed. Without further noticing these matters, we refer to another question of interest that has been very forcibly presented in argument; that is, whether the courts of this State have any jurisdiction, by mandamus, to compel the governor to perform any duty devolved upon him as governor by the Constitution and laws.

As to purely executive or political functions devolving upon the chief executive officer of a State, or as to duties necessarily involving the exercise of official judgment and discretion, we think it may be safely assumed that mandamus will not lie. This necessarily results from the nature of a government having three independent departments—executive, legislative and judicial. Such is the doctrine well settled by authority. See *Hughes v. Ex. Rem.*, § 118.

The author further says: "As to duties of a ministerial nature, and involving no element of discretion, which have been imposed by law upon the governor of a State, the authorities are exceedingly conflicting, and indeed utterly irreconcilable. Upon the one hand it is contended, and with much show of reason, that as to duties of this character the general principle allowing relief by mandamus against ministerial officers should apply, and the mere fact of ministerial duties having been required of an executive officer, should not deter the courts from the exercise of their jurisdiction. Upon the other hand it is held, that under our structure of government, with its three distinct departments—executive, legislative and judicial—each department being entirely independent of the other, neither branch can properly interfere with the duties of the other, and as to the nature of the duties required of the executive department by law, and as to its obligations to perform these duties, it is entirely independent of any control by the judiciary. While the former theory has the support of many respectable authorities, and is certainly in harmony with the general principles underlying the jurisdiction as applied to purely ministerial officers, the latter has the clear weight of authority in its favor, and may be regarded as the established doctrine upon this subject."

The author then proceeds to review the various cases upon the

subject, the substance of most of the cases being set forth in the notes.

The Supreme Courts of Ohio, Alabama, California, Maryland and North Carolina, have decided in favor of the jurisdiction, in cases where it was claimed the duties were ministerial, the cases presenting the question in different aspects; while opposed to the jurisdiction are the Supreme Courts of Arkansas, Georgia, Illinois, Louisiana, Maine, Minnesota, New Jersey, Rhode Island and Missouri.

We will not undertake to review the several cases, or to distinguish them. We have, however, examined the reasoning in the several cases, and our own convictions are decidedly against the exercise of the jurisdiction, and we are of opinion that there can, as to its exercise, be no sound distinction in respect to the character of the act to be performed by the governor as chief executive.

In the very nature of such a government each department within its sphere must be independent of the other, and neither can rightfully interfere with the others in the discharge of their appropriate duties. And whatever duty or function is devolved upon either department becomes a part of its appropriate or exclusive duties. And in the case of the governor it does not change the result that the duty might have been imposed upon a ministerial officer, and if imposed upon a ministerial officer, he might have been compelled to perform it. It does not follow that when the duty is imposed upon the governor, the courts have jurisdiction to control his acts.

The governor holds but one office, that is the office of chief executive. Any duty which he performs under authority of law is an executive duty, otherwise we would have him acting in separate and distinct capacities. In some respects he would be the chief executive, an independent department of the government; as to other duties he would be a mere ministerial officer, subject to the mandate of any judge of the State, and we must assume also that the judge would have the power to imprison the governor if he refused to obey his order, for if the court has this jurisdiction the power to enforce the judgment must follow.

It is said if this jurisdiction be not granted there is no remedy in cases where the governor refuses to perform his duty with respect to the rights of the citizens. If the duty of performing a certain act is by law devolved upon the governor, and in the exercise of his judgment and discretion — and it is difficult to imagine

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any act to be performed by a governor where some degree of judgment and discretion is not involved — he decides against the claim of the citizen, the citizen has had his remedy. If the governor corruptly act in violation of law and right, he may be impeached. It does not follow, because the right claimed depends upon a construction of our laws, that the court must therefore decide it. The courts can only decide in those cases where by law they have jurisdiction.

Without a further discussion of the question, we refer to the cases upon the subject referred to in the notes to High on Ex. Rem., § 118 *et seq.*

The judgment dismissing the petition will be affirmed.

Another case of the same character will also be dismissed.

Judgment affirmed.

CAGILL V. WOOLDRIDGE

(8 Bart. 580.)

Comity — inter-State — receiver.

A receiver, duly appointed in another State, may maintain replevin here for property sent here by him for sale, as against an attaching creditor.*

REPLEVIN. The opinion states the case. The defendants had judgment below.

G. W. Winchester, for plaintiff.

Gantt, Patterson & Lowe and *Brown & Lyles*, for defendant.

McFARLAND, J. Toof, Philips & Co. caused fourteen bales of cotton to be attached as the property of R. E. Treviathen, by process from the Second Circuit Court of Shelby county. Shane, Harris & Co. brought an action of replevin to recover the property from the sheriff. Afterward W. J. Cagill was substituted as plaintiff, and Toof, Philips & Co. as defendants in the action, and the cause was subsequently revived against Wooldridge & Oliver, assignees of Toof, Philips & Co. The trial resulted in a verdict and judgment for the defendants. The plaintiff has appealed in error.

*To same effect *Pond v. Cooke* (45 Conn. 126), 20 Am. Rep. 605.

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The case which the plaintiff insists was made by the proof is, in brief, that in certain litigation in the State of Arkansas, in which said Treviathen was a party defendant, the details of which need not be set out, the plaintiff, Cagill, was appointed receiver of certain property and effects, and ordered to take the same into his possession, among other things the fourteen bales of cotton in controversy, and to sell said cotton, or to ship the same to Memphis or elsewhere for that purpose, and to hold the proceeds subject to the order of the court; that the appointment was made upon allegations in the pleadings giving the court power and jurisdiction to make the appointment; that the cotton was then within the jurisdiction of the court in the State of Arkansas, and was actually taken into possession by the plaintiff, Cagill, and shipped to Shane, Harris & Co., at Memphis, for sale, where it was attached as the property of Treviathen by Toof, Philips & Co., as before stated.

The Circuit judge charged the jury that in order to "entitle the plaintiff to recover, it is necessary that he shall have established some general or special property in the cotton in controversy; it is not sufficient for him merely to have established the fact that he was appointed receiver by the Chancery Court of Independence county, Arkansas, and came into possession of the cotton by virtue of such appointment, and if you find from the evidence that he has shown no other right to the property than as such receiver, and that the parties whom defendants represent, Toof, Philips & Co. were creditors of Treviathen, and attached the property in Memphis as the property of Treviathen, you will find for the defendant."

This was the entire charge, although further specific instructions were asked by the plaintiff's attorney. We think the charge is erroneous, and that the judgment must be reversed. It is true, that if a receiver, appointed by the courts of another State, should, by virtue of such appointment, seek to recover in our courts property to which others had acquired rights here, the claim would not be enforced. That is, our courts would not in such a case lend their aid to enforce and carry out the order of the foreign court as to property within our jurisdiction. The right of the receiver as such could not be recognized in our courts. But where the court of a sister State, having jurisdiction of the parties and subject-matter, and having the property within its actual control, appoints a receiver to take possession of and sell the property, and this order is executed by the property being actually taken into possession by

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the receiver, we think beyond doubt this would give to the receiver against the parties to the litigation, and those claiming through them, a special property and right of possession that would enable him to maintain an action of replevin, and that this right would not be lost by sending the property to this State for sale. To this extent we would respect the orders and judgments of the courts of sister States. The receiver can, in such case, maintain the action in his individual capacity. See *Graydon v. Church*, 3 Mich. 36. We do not think the authorities referred to by the counsel for the defendants establish a contrary doctrine. Of course we decide nothing as to the other questions argued, or as to whether the proof sustains the plaintiff's case.

The charge being erroneous upon the material question, the judgment must be reversed.

Judgment reversed.

CASES
IN THE
COURT OF APPEALS
OF THE
STATE OF TEXAS.

VALLE V. STATE.

(© Tex. Ct. App. 57.)

Constitutional law — right to counsel in criminal case.

A prisoner cannot be tried for felony without counsel to assist him, unless he expressly waives that right.

CONVICTION of theft. The opinion states the case.

W. B. Dunham, for State.

WINKLER, J. The appellant, defendant below, having been convicted of theft of horses belonging to one William Adams, and his punishment assessed at five years' confinement in the penitentiary, filed under oath a motion for a new trial, which was overruled, and the action of the court below on the motion for a new trial is assigned as error.

It is set out in the motion for a new trial that the defendant is a poor, ignorant Mexican, who did not understand the proceedings of the court, except through an interpreter; that the indictment

against him was filed on April 13, 1880, and was served the same day, at five o'clock, P. M.; that he was brought out of jail on the next day, April 14, 1880, at two o'clock, P. M., when his case was called, and he was then asked if he had any counsel, to which he replied that his brother had gone to the Nueces to obtain money to procure the same; that he was then asked if he was ready for trial to which he answered, "Yes," not knowing of his right to two days' service of a copy of the indictment in which to prepare and fix his pleadings; that he would certainly not have announced ready for trial had he been aware of this right, because before the expiration of the two days he would have been able to procure counsel, as he did; and that he did not know of his right to address the jury in his own behalf, believing, in his ignorance, that without counsel he had no right to do so, and that having no counsel, and not being informed by the court, he had no means of knowing what his rights were in the premises. The motion also states that the verdict was contrary to the evidence, there being no evidence to show any criminal intent on the part of the defendant in taking the horses, and that the finding of the jury is contrary to law.

The ignorance of the defendant's rights under the law, as set forth in the motion for a new trial, where the subject appears for the first time, is the principal question presented by the record for consideration here. This is to some extent a novel one, and one which has not, that we are aware of, been precisely adjudicated by the courts of last resort in Texas. It therefore becomes necessary that we take into consideration the several provisions of our Codes, and also the provisions of the Constitution, which bear upon the subject, as well as the lights afforded by the general principles of law and adjudications of the courts, which are deemed sufficient to afford a safe rule for our guidance in determining the merits of the present appeal and the right of the defendant to a new trial on the grounds set out in the record, and as therein stated, and under such rules as will apply as well to this as to other similar cases which may arise hereafter. In the performance of this duty, we regret, as is often the case, that we have not the aid of counsel, or any reference to authorities, to guide our investigations, there being no appearance here of counsel or brief for the appellant.

Some of the facts stated in the motion for a new trial are borne out by the record, — as, for instance, that the indictment was returned into court on April 13, 1880, and that the defendant was

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brought to trial on the next day, —and perhaps negatively, that an interpreter was appointed for him, and that he was tried without counsel to represent him. By the Constitution of the State, certain rights are guaranteed to one accused of crime, in all criminal prosecutions ; among other things, he is entitled to a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the action against him, and to have a copy thereof, and he shall also have the right of being heard by himself or counsel, or both. And no person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia when in actual service, in time of war or public danger. Bill of Rights, § 10. These constitutional guarantees, being excepted out of the general powers of government (id. § 29), are beyond legislative control, and any law contrary thereto would be absolutely void. Art. 1, § 29. Now, whilst these rights are guaranteed by the Constitution, and are placed beyond the control of the law-making power of the State, and are binding as well upon the executive and judicial departments of the government, that instrument is silent as to how these rights are to be asserted ; and in the absence of constitutional direction, the subject is of necessity remitted to the law-making power as to the manner of enforcing these rights ; but neither the legislative, nor the executive, nor the judiciary has any power whatever to deprive one accused of crime of the guarantees provided in the Bill of Rights. Still, the legislature may provide by law for the manner of asserting those rights, and it is believed can punish the person entitled to them, or any of them ; and hence, by the law in force both before and after the adoption of the Constitution, the laws enacted by the legislature provided for the manner of organizing juries for the trial of those accused of crime, regulating the manner of apprising the accused of the nature of the accusation, and furnishing him with a copy thereof, and the like ; and it has been expressly provided that "the defendant to a criminal prosecution for any offense may waive any right secured to him by law, except the right of trial by jury, in a felony case." Code Cr. Proc., art. 23 (Orig. Code Cr. Proc., art. 26). The right of a trial by jury cannot be waived in a felony case, and being guaranteed by the Constitu-

tion, has not been impaired by the legislature. The same may be said as to an indictment. The Constitution having required this as the only mode of charging felonies, the legislature could not deprive one accused of crime of that mode of prosecuting the accusation against him, and this has not been attempted. The Constitution not only requires that felonies shall be prosecuted by indictment, but also requires that the indictment shall have a certain special form of commencement and conclusion. This requirement has not been interfered with, but has been observed by the legislature in prescribing the essential requisites of an indictment. Code Cr. Proc., art. 420, subd. 1, 8. This constitutional requirement and particularly the conclusion, it was held by our Supreme Court, and by this court, the courts are bound to respect and observe, and could not disregard it, for the reason that an indictment was and is required by the Constitution to commence in a certain way and to conclude in a certain way set out in the Constitution. In the cases of Cox, Ryan and Sitterlie, decided by this court at the last Galveston term, all accessible authorities were carefully examined, and the former rulings of both the Supreme Court and of this court were supported, and it was there reaffirmed that the courts could not disregard a plain constitutional provision, no matter at what stage of the proceedings the attention of the court was called to the fact that it had been disregarded, and that it could not be deemed as having been waived or cured by the verdict. So far as we are advised, notwithstanding the article of the Code set out above, the disregard of a plain provision of the Constitution, and particularly of a right guaranteed to one accused of crime by the bill of rights, has not been held to have been cured by verdict. Our remarks, however, must be understood as applying to the question presented by the motion for a new trial in the present case, rather than to a case not before the court.

The causes for which new trials may be granted, as well as the mode of procedure in relation to new trials, are carefully enumerated and set out in the Code of Criminal Procedure, arts. 775 to 784, inclusive.

One of the grounds upon which a new trial may be granted in a felony case is set out in subd. 1 of art. 777, as follows: "Where the defendant has been tried in his absence, or has been denied counsel." And where the court has committed any material error calculated to injure the rights of the defendant. Clause 2, art. 777.

When a motion for a new trial is offered, the law has provided that the State may take issue with the defendant upon the truth of the causes set forth in the motion. Art. 781. It does not appear that the State made any attempt to controvert the truth of the causes set out in the motion; hence we may regard it that the grounds set out in the motion were conceded by court and counsel to be true. Now, inasmuch as the Constitution guarantees the right of a defendant, when accused of crime, to be heard, by himself or counsel, or both, are we to conclude that the defendant had waived the right of being heard by counsel? We are of opinion, that under art. 23 of the Code, the right of the defendant to be heard by counsel could have been waived by the defendant; but this is not the question. The question is, Did he waive that right? It will not be contended that the record shows affirmatively that he did so. He says in the motion that he was ignorant of the language in which the proceedings against him were being conducted, and was not informed as to what his rights really were.

As we have already seen, in all criminal prosecutions the accused "shall have the right of being heard by himself or counsel, or both," this being one of the rights guaranteed by the bill of rights. That it is an important right will hardly be denied. If there be any who would question its importance, if they would look into the history of the progress of this right from the time when, in England, the judge was counsel for the accused, and consider the outrages sometimes perpetrated against life and liberty during those times, their objections would vanish. It was said with reference to a capital case in a note by Mr. Cooley (Const. Lim. 331): "When an ignorant person, unaccustomed to public assemblies, and perhaps feeble in body or intellect, was put upon trial on a charge which, whether true or false, might speedily consign him to an ignominious death, with able counsel arrayed against him, and all the machinery of the law ready to be employed in bringing forward the evidence of circumstances indicating guilt, it is painful to contemplate the barbarity which could deny him professional aid." This argument, it seems, would apply, with force abated, it is true, to the case at bar, where it is shown by the testimony that the accused was but the hireling of the prosecuting witness, the owner of the horses alleged to have been stolen, and for the theft of which he had been put through the forms of a trial and convicted, without having been informed as to what his constitutional rights

were, and being unacquainted with the language in which the proceedings against him were being conducted. Says Mr. Cooley: "Perhaps the privilege most important to a person accused of a crime connected with his trial is that to be defended by counsel. From very early days," he says, "a class of men who have made the laws of their country their special study, and who have been accepted for the confidence of the court in their learning and integrity, have been set apart as officers of the court, whose special duty it should be to render aid to parties and the court in the application of the law to legal controversies." Illustrative of the importance attached elsewhere to this right of counsel, in *Commonwealth v. Knapp*, 9 Pick. 496; 20 Am. Dec. 534, which was a trial for murder, we find it stated that on the arraignment of J. Francis Knapp he desired that R. Rantoul, who had recently been admitted an attorney of the Court of Common Pleas, might be assigned as one of his counsel; but the court refused his request, observing that they had no control over Rantoul as an officer of that court, and adding that it was proper that a person of more legal experience should be assigned, who might render aid to the court as well as to the prisoner.

It seems that whilst in England it was not until after the revolution of 1688 that a full defense was allowed on trials for treason, and not until 1836 that the same privilege was extended to persons accused of other felonies, still, with us, says Mr. Cooley, it is a universal principle of constitutional law that the prisoner shall be allowed a defense by counsel. And generally, he says, it will be found that the humanity of the law has provided that if the prisoner is unable to employ counsel the court may designate some one to defend him, who shall be paid by the government; but where no such provision is made it is a duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance nor spare his best exertions in the defense of one who has the double misfortune to be stricken by poverty and accused of crime. No one, he says, is at liberty to decline such an appointment, and few, it is to be hoped, would be disposed to do so. Const. Lim. 334. It has been said that a court has a right to require the services, whether compensation is made or not, and that counsel who should decline to perform it for no other reason than that the law does not provide pecuniary compensation is unworthy to hold his

responsible office in the administration of justice. Chief Justice HALE, in Campbell's Lives of the Chief Justices, vol. 2. With us the law, in addition to the constitutional provisions above referred to, has provided that in capital cases, when the defendant is brought into court for the purpose of being arraigned, if it appears that he has no counsel, and is too poor to employ counsel, the court shall appoint one or more practicing attorneys to defend him, and the counsel so appointed shall have at least one day to prepare for trial. Code Cr. Proc., art. 511. And on an inquiry as to the sanity of a defendant after conviction, if the defendant has no counsel the court shall appoint counsel to conduct the trial for him. And in criminal trials before a justice of the peace the defendant has a right to appear by counsel, as in all other cases. Code Cr. Proc., art. 726. While the provisions of the Code do not seem to require of the court the appointment of counsel for a defendant except in capital cases, yet the practice has been general, so far as our observation has extended, for the courts to appoint counsel in all cases of felony, when it shall be made to appear that the defendant is unable to employ counsel.

But we need not pursue at present this investigation further. The law, in its magnanimity, does not assume that every one accused of crime is guilty of crime; on the contrary, though solemnly charged by indictment of the grand jury of having violated the law, even then he enters upon his trial before the petit jury shielded by the presumption of innocence, which protects him against conviction until he is proved guilty beyond a reasonable doubt. The importance of the right of having the aid of counsel in conducting his defense must be apparent to all who have even given the slightest thought to the subject.

It is not our purpose at this time, nor is it material to a determination of the present case, that we should attempt to lay down any definite rules, or make a practical application of the several provisions of the statutes on the subject of appointing counsel to represent those who are unable, by reason of their poverty, to employ counsel to represent them in trial courts when accused of crime. The authorities cited are intended to show, in some degree, the importance which the law attaches to the right of being heard by counsel on the trial, in order to have some well-defined idea of their bearing upon the motion for a new trial on the grounds set out in the motion.

In view of the facts which appear in the motion, and not controverted by the State, we are not prepared to say that the court did not err to the prejudice of the defendant, by depriving, or rather failing to appoint him counsel to represent him on the trial, under the peculiar circumstances under which the defendant was placed at the time of the trial; nor are we prepared to say, from the record before us, that the defendant waived his constitutional right to the aid of counsel; nor is there any thing set out in the record which calls upon us to infer any thing further on the subject than that he had sent his brother for means to enable him to employ counsel. It is true that it does not appear that the defendant asked the court to assign him counsel; but it does appear, with reasonable certainty, that he did not understand the English language, and that whatever intercourse he had with the court was through the aid of an interpreter. Whether an interpreter was appointed for the defendant at his request, or whether he was acting under oath, does not appear. The inference is strong that after the trial he procured the aid of counsel in preparing the motion for a new trial, and under the circumstances we are of opinion that the court erred in permitting the trial to proceed against the defendant without giving him the aid of counsel, and without having informed him as to his legal rights; and when the motion for a new trial was presented, setting up the facts in detail, and these facts were verified by the affidavit of the defendant, and not controverted by the State, we are of opinion the court should have awarded the defendant a new trial.

Because the District Court erred in refusing to grant the defendant a new trial, the judgment will be reversed and the cause remanded.

Reversed and remanded.

McCAMPBELL V. STATE.

(9 Tex. Ct. App. 134.)

Constitutional law — juror not understanding English.

A juror, not understanding and speaking English, cannot be forced upon a prisoner, although his peremptory challenges may have been exhausted. (See note, p. 738.)

CONVICTION of theft. The opinion states the case.

W. B. Dunham, for State.

CLARK, J. There are several errors patent upon the record in ~~this case~~, either of which must be deemed fatal to the conviction.

1. As appears from a bill of exceptions duly saved and certified; before the process of impanelling the jury was begun, the defendant objected *in limine* to any person being sworn and impanelled as a juror who did not understand and speak the English language; which objection was overruled by the court. Thereupon the jurors, as summoned, were called, and the defendant exercised his right of peremptory challenges until they were exhausted; after which eight jurors, whose names are set out, were called, and upon their *voir dire* stated that they did not speak or understand the English language. The defendant then challenged each of these jurors for cause on that account, which challenges were disallowed, and the jurors accepted over his objection. When the argument was reached, counsel for defendant asked the privilege of addressing the jury in the Spanish language, that being the only language understood by a majority of the jury. This was refused, although no objection was interposed by the State.

The right of a defendant charged with felony to be tried by jurors who understand the English language is not an open question in this State. In *Lyle's case*, 41 Tex. 172; s. c., 19 Am. Rep. 38, the question was maturely considered, and determined affirmatively, and no subsequent legislation, organic or statutory, has qualified the ruling in that case. Our Code of Criminal Procedure, embodying the jury law of 1876, provides that an inability to read and write is a cause for challenge, except when it appears that the requisite number of jurors who are able to read and write cannot be found in the county. Art. 636, § 14. But this cannot affect the constitutional qualification as determined in *Lyle's case*, nor force a citizen to trial in any locality, before a jury, or any portion of a jury, who are unable to understand the language in which the proceedings are required by law to be conducted. A trial would be equally fair and impartial, within the meaning of the Constitution, before a jury of deaf mutes, who, by reason of their misfortune,

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could not hear a word of the testimony or argument of counsel; and a trial before either could be nothing less than a mockery.

[Omitting minor questions.]

The judgment is reversed and the cause remanded.

Reversed and remanded.

NOTE BY THE REPORTER. — In *Nolen v. State*, 9 Tex. Ct. App. 419, the court considers without deciding, the question whether it is cause for challenge that a juror is unable to read and write English, he being able to speak and understand it when spoken, and to read and write German. The court observed:

"In determining this question it will be necessary to notice the provisions of law, both constitutional and statutory, and construe the legislative enactments with reference to the provisions of the Constitution. The Constitution declares that 'in all criminal prosecutions the accused shall have a speedy public trial by an impartial jury.' Bill of Rights, § 10. The Code of Criminal Procedure, art. 636, declares that a challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury, and it may be for either of the following causes: * * * '14. That he cannot read and write.' But it is also provided that this cause of challenge shall not be sustained where it appears to the court that the requisite number of jurors who are able to read and write cannot be found in the county. The naked question here presented is this: What is the scope and extent of the meaning of the words 'that he cannot read and write?' Is the expression to be held to mean those who have the ability to read and write any language whatever, whether known and understood in this country or not, or is it to be confined to any particular language; and if so, to what particular language?"

"In *Lyle v. State*, 41 Tex. 172; s. c., 19 Am. Rep. 38, it was held that those who did not understand the English language were not competent jurors, apparently on the ground that they were unable to comprehend the proceedings in court, they being conducted in that (the English) language. In *Etheridge v. State*, 6 Tex. Ct. App. 132, it was said that 'ignorance of, or inability to speak and understand the English language, though not mentioned (as a disqualification by statute), has always been held a disqualification by virtue of the constitutional guaranties of a fair and impartial trial, and one conducted by due course of the law of the land.' Mr. Bishop, in his work on Criminal Procedure, vol. 1, § 923 (latest edition), lays down a general rule on the subject to this effect: An insane person is incompetent; so is one who is drunk. 'Likewise, one unacquainted with our language is more or less disqualified, according to the extent of the incapacity and the time and manner of taking the objection.' This rule seems to have been deduced from *Lyle v. State*, and *State v. Push*, 23 La. Ann. 14, as these are the cases cited. We have already referred to the ruling in *Lyle's* case. In *Push's* case, as we find it reported, the Supreme Court affirmed the action of the court below, where a challenge made by the State was sustained on the ground that the juror did not understand the English language, but only the German. In *White v. State*, 52 Miss. 216, it was said there was nothing in the objection that the juror could neither read nor write. In the case in 2 Hawley's Am. Cr. Rep. 454, this ruling is based on the fact that the legislature has not defined an educational or intellectual qualification in that State for jurors. In *Atlas Mining Company v. Johnson*, 23 Mich. 36, it was said, 'We think the court has a discretion in this matter; * * * and as to the juror who was excused because he did not understand the language, we think it would have been highly improper to have allowed him to sit in the cause, though unchallenged.' In the case of *Montague v. Commonwealth*, 10 Gratt. 767, it was held that, on a trial for felony, the court, of its own motion, without suggestion or consent of either party, may excuse or set aside a juror who is in all other respects competent, because, among other grounds, of his ignorance of the vernacular tongue, whereby he is rendered physically or mentally unfit. This is the extent to which accessible authorities go.

"It must be conceded that none of these authorities goes to the extent of deciding the precise question under consideration. We confess it is a difficult and embarrassing question. To hold that the legislature meant that those only who are able to read and write

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the English language are competent to serve as petit jurors would seem a hardship to many intelligent citizens of superior education, though wholly ignorant of the English language in so far as ability to read and write it are concerned; whilst to hold that it extends to those who can read and write any language whatever would admit to the performance of jury duty those otherwise objectionable, but who are not otherwise excluded. When we consider, however, that the English is the common language of the country, and that it is the language in which our courts are conducted, and in which all our legislative proceedings have been conducted from the date of our Declaration of Independence, in 1776, to the present time, and particularly when we consider that this was the language in which were conducted the proceedings of the legislature which passed the law in question, and in which the laws were all written, in connection with the manifest fact that the legislature intended to place the jury service in the hands of those who were fitted for its performance by virtue of their interest in the due administration of the laws, to the exclusion of the rabble, we confess that the inclination of our minds is to hold that when the legislature enacted the law that inability to read and write is a disqualification of a juror, they had in their minds the language they themselves made use of, and the common language of Texas and the other American States—the English language. But inasmuch as the question is important, and because its solution is not indispensable to a decision of the present case, we decline to do more at present than to call attention generally to the subject in order that it may be thoroughly investigated, and, if need be, that a legislative expression may be elicited. We simply indicate our present impressions, as the result of the investigations we have had opportunity to make."

In *Town of Trinidad v. Simpson*, Colorado Supreme Court, April term, 1880, under a statute prescribing that "all male inhabitants of the State over the age of twenty-one years who are citizens of the United States, etc., and who have not been convicted of felony," shall be competent to sit as jurors, *held*, that ignorance of the English language would not disqualify one from sitting as a juror, but a wise discretion would excuse from jury duty persons ignorant of that language. The court said:

"Is inability on the part of persons called as jurors to speak the English language and to understand it when spoken, necessarily a disqualifying fact? The question is not without difficulty.

"The statute declares that 'all male inhabitants of the State, of the age of twenty-one years, who are citizens of the United States or have declared their intention to become such citizens, and who have not been convicted of felony, shall be competent to serve as grand and petit jurors in all courts and judicial proceedings in the State.'

"These are the general statutory qualifications of a juror. One possessing them, however, is still subject to challenge. Section 161 of the Code provides that either party may challenge peremptorily or for cause, limiting peremptory challenges to four. Section 163 enumerates seven several grounds upon which challenges for cause may be taken. It is unnecessary to advert to them further than to say that inability to speak or understand the English language is not enumerated as a ground of challenge.

"This is not a case, however, where enumeration is to be taken as excluding disqualifying causes not enumerated; otherwise deafness, insanity and like physical and mental disqualifications, absolute in their character, would be unchallengeable. The maxim *expressio unius est exclusio alterius* is not of universal application in the construction of statutes. The legislative intention is to be taken according to the necessity of the matter and according to that which is consonant to reason and sound discretion. *Broom's Leg. Max.* 664."

"In the silence of the statute, therefore, the grounds of challenge in this cause stand as at common law, to be determined by a consideration of the duties imposed upon a juror and the qualifications thereunto requisite.

"Challenges to the poll are reduced by Sir Edward Coke under four different heads: *propter honoris respectum, propter defectum, propter affectum, and propter delictum*. 3 Black. Com. 361,* 362.*

"If to either, the challenge in the present case must be referred to the second head; it is a defect of education, but only in a relative and limited sense. Knowledge of a language other than a person's vernacular is but an accomplishment; want of it argues nothing respecting mental culture, in fact may co-exist with the highest intellectual attainments,

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and the greatest aptitude for the duties of a juror. While this is the case, the inability of a juror ignorant of the language in which the proceedings of the court are had to discharge the duties of a juror unaided is patent.

"It is his duty to listen to the evidence, the arguments of counsel and the instructions of the court. Ignorance of the language as a matter of fact is as conspicuously a disqualifying circumstance as though he was deaf, unless the court may aid him in the discharge of his duties through the instrumentality of an interpreter; hence the question comes to this: May the court in such a case interpose an interpreter? If it has the power, the disqualification is removable; if not, it is complete and absolute.

"It is true there is no express authority of statute so to do, but there is a general power conferred by section 408 of the Code upon District Courts to make rules and regulations governing their practice and procedure in reference to all matters not expressly provided for by law. Independently of statute, courts of original jurisdiction have inherent power to make and enforce rules for the transaction of their business, subject only to the condition that they do not contravene the laws of the land. *Gannon v. Fritz*, 79 Penn. St. 202.

"It must be borne in mind that the territory embraced in quite a number of the counties in the southern part of the State, and among them the county in which this litigation originated, formerly belonged to the Republic of Mexico; that it was acquired by treaty by the United States, and that the inhabitants thereof were largely, if not exclusively, a Spanish-speaking people. Of this fact we take judicial notice. These people are in all respects citizens, and the association of alienage and its disabilities with ignorance of our language is to be dismissed. Under like circumstances it was provided by statute, in the State of California, that a juror should have sufficient knowledge of the language in which the proceedings of the court were had; but certain counties, where a large portion of the population were ignorant of the English language, were excepted by the statute from the operation of this rule. It is a noticeable fact that both under our territorial and State governments, legislation touching the administration of the law has proceeded without any express reference to or recognition of the fact, that in the counties mentioned its administration would chiefly concern, as for its agencies it would be largely dependent upon, a Mexican citizenship. In the early history of the Territory it would have been perhaps impossible in these counties to obtain an English-speaking jury. Even now the exclusive rule that is contended for, if it did not defeat the administration of the law in these counties, would devolve the burdens of jury duty upon a very limited number.

"We cannot conceive that legislators have been blind to these facts or negligent of their demands. In the absence of express legislation we presume them to have regarded the difficulty as amply provided for, either in the provisions of section 402, cited *supra*, or in the inherent powers of the courts of original jurisdiction which they had established for the administration of the law. For these reasons we think it was fully within the power of the court to appoint an interpreter, under the sanction of an oath, to interpret the testimony of witnesses and the arguments of counsel. This would affect the discharge of their duties as jurors while in the jury box. Further than this we do not decide.

"It does not appear that an interpreter was appointed; but it is to be presumed that the court did whatever was necessary in this behalf.

"As to the discharge of their duties in the jury room—the duties of consultation, decision and agreement—it does not appear but what the other jurors of the panel were Mexicans, and spoke the Spanish as well as the English language; if so, no interpreter was necessary after their retirement from the jury box.

"We are told that we must presume that they were English-speaking only. Respecting the jurors in a county where the English-speaking class is so limited, and the Spanish-speaking class is so largely in excess, such a presumption would be without foundation in fact, and inadmissible. Without this presumption it does not affirmatively appear that the jurors named were disqualified for the duties of the jury room. We desire to say, however, that the power of the court to interpose an interpreter in the jury room is embarrassed by considerations not attaching to the appointment of an interpreter to act in the presence of the court, and if it exist its exercise should be limited to cases of strict necessity.

"Much stress is laid upon the proposition that all judicial proceedings must be in the English language, and the case of *Dunton v. Montoya*, 1 Col. 99, is cited as authority. In

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that case the *narr.* was in the Spanish language, and the doctrine of the case must be limited to the declaration that all *pleadings* must be in English. The fallacy of the argument on this proposition consists in treating a general rule as though it were an exclusive rule. The declaration of the Code (§ 405) is that 'every written proceeding in a court of justice in this State, or before a judicial officer, shall be in the English language.' * * This is substantially the statute of 4 Geo. 2, 693, which enacts 'that both the pleadings and the record should thenceforward be framed in English.' Stephen's Pleadings, appendix 24. Prior to that time the record and pleadings (after the introduction of written pleadings) had been framed in Latin, and the statute had for its object the abolition of that practice.

"By statute 36 Edward III, it was enacted that 'for the future all pleas should be pleaded, shown, defended, answered, debated and judged in the English tongue, but be entered and enrolled in Latin.' 8 Black. Com. 318. The arms of Edward had prevailed over those of France, and the object of the statute was to banish from the English courts of justice the use of the Norman or law-French introduced after the Conquest. This appears to be the only statute on the subject prior to the fourth year of James I.

"How far and with what modifications it may be said to prevail as part of our common law, need not be discussed. Undoubtedly laws are to be administered in the language of the people adopting them. The people of this State, as of the United States, are an English-speaking people, and in the silence of the statute, all judicial proceedings would be, as of course, in that language. It does not follow, however, that they would be exclusively so. This proposition must be taken subject to the practical necessities that daily arise in the administration of the law in courts of justice.

"Contracts in a foreign tongue are to be dealt with, and must be translated. Non-English-speaking witnesses are put upon the stand and must 'bear witness' through an interpreter. Non-English-speaking prisoners are put upon their trial, and the indictment and other proceedings of the trial are made known and manifest to them by the same instrumentality. The proposition, therefore, that all judicial proceedings must be in the English language, must be taken *sub modo*.

"In this view, the difficulty made respecting the instructions of the court also disappears. While under the Code they must be in writing, and under section 405, in English, we do not conceive that their translation into Spanish for the use and instruction of a juror understanding that language alone, would be inhibited by the spirit of the section. The object of the provision is to secure a record in English, and this would in no wise be defeated.

"The hypothetical case put by counsel of a jury composed of persons of several different nationalities, is met by the suggestion that extremes prove nothing. Such complications are not likely to arise where ample judicial discretion exists.

"We are not unmindful that there are many serious objections to the interposition of interpreters in judicial proceedings, and while we hold it within the power of the court to appoint an interpreter under the circumstances of this case, it was also within its discretion to exclude the jurors named for the cause assigned. *People v. Arceo*, 33 Cal. 40; *Atlas M. Co. v. Johnson*, 23 Mich. 37; *State v. Marshall*, 8 Ala. (N. S.) 308.

"Such persons are not disqualified, but whenever it is practicable to secure a full panel of English-speaking jurors, a wise discretion would excuse from jury duty persons ignorant of that language.

"The cases of *Fisher v. Philadelphia*, 4 Brewst. 395, and *Lyles v. State*, 41 Tex. 173; s. c., 19 Am. Rep. 83, are cited against the conclusion arrived at in this opinion. The first authority we have been unable to obtain. With the reasoning of the last we are not satisfied. If our conclusion as to the power of the court to appoint an interpreter be correct, the foundation upon which the conclusions in that case appear to rest, disappears."

We think there can be no doubt of the unsoundness of this last case.

HUDSON V. STATE.

(9 Tex. Ct. App. 151.)

Criminal law — larceny — several articles at one time and place — bar.

Larceny of several articles, belonging to several owners, by one person, at the same time and place, constitutes but one offense, and conviction or acquittal of larceny of any one of them is a bar to a prosecution for larceny of any of the rest.*

CONVICTION of theft. The opinion states the case.

W. R. Dunham, for State.

WINKLER, J. The indictment upon which the appellant was convicted charges him with the theft of one gold watch, the property of Mrs. Juliet M. Hurndall, alleged to have been committed in Gillespie county, on August 13, 1879. On the trial, the appellant, besides entering the plea of not guilty, pleaded a former conviction for the same offense, and on another indictment, and before the same tribunal wherein it was then sought to try him again. The indictment pleaded in bar of this prosecution charges him with the theft of four National-bank notes, of the currency of the United States, of the value of \$10 each; one National-bank note, currency of the United States, of the value of \$5, and other articles of personal property and apparel described in the indictment, and amounting in the aggregate to the value of \$97, averred to be the property of Herbert Hurndall. This also is alleged to have been committed on August 13, 1879.

On the trial, Mrs. Juliet M. Hurndall, the alleged owner of the gold watch mentioned in the indictment, testified that she knew the defendant in August, 1879; that he lived in their house three or four months and left there in the night of the 13th of August, 1879; that between nine and ten o'clock on the 14th, following, she says, "we ascertained that my gold watch and the articles named in indictment No. 344 were missing. We got all the articles back at the same time, from John Walter, sheriff of Gillespie County. * * * The watch was taken from my trunk in my chamber."

*To same effect, *State v. Hennessey* (23 Ohio St. 330), 12 Am. Rep. 232.

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On cross-examination, this witness testified that she and her two sons, Herbert Hurndall and Henry Hurndall; her husband, Mr. Hurndall; and the defendant, lived in the same house; that the articles mentioned in the indictment (No. 344) belonged to her son Herbert Hurndall, and that these articles and her watch were all missing on the morning of the fourteenth day of August, 1879, and all taken from the same house, but from different rooms; and that the house was under the control of her husband.

The indictment No. 344 was introduced in evidence, and also the verdict and judgment, by which the defendant was convicted and his punishment assessed at confinement in the State penitentiary for a term of ten years. Herbert Hurndall testified that the articles mentioned in indictment No. 344 belonged to him, and were taken from his room in the house occupied by himself, his brother, and his step-father and wife; that the four ten-dollar bills, currency, were taken from his trunk, in his room, and that his room is separate from Mrs. Hurndall's, but all in the same house; and that the house was under the control of the witness' step father, Mr. Hurndall.

The only questions necessary to be considered arise on the plea of former conviction, and the correctness and sufficiency of the instructions given to the jury on that subject, under the pleadings and the evidence.

In *Wilson v. State*, 45 Tex. 76, the Supreme Court had before it a case involving a question quite similar to the one here presented, and took occasion to examine authorities on the subject. The conclusion there reached is expressed in the opinion of the court in the following language: "Our conclusion is that the stealing of different articles of property belonging to different persons, at the same time and place, is but one offense against the State, and that the accused cannot be convicted on separate indictments, charging different parts of one transaction as a distinct offense. A conviction on one of the indictments bars a prosecution on the other." In *Wilson's* case the court cite *Jackson v. State*, 14 Ind. 327, where it was said in the indictment charged the defendant with stealing two horses. It appeared, that together with the horses, he stole saddles and bridles, though not so charged in the indictment, and this was objected to as a fatal variance. The court held that the omission to include in the indictment the other articles stolen at the same time, and forming part of a single offense, was for the defendant's benefit, if it had any bearing upon the case. "The State can-

not split up one crime and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime." In *Roberts v. State*, 14 Ga. 8, the court said the plea of former acquittal or conviction is sufficient whenever the proof shows the second case to be the same transaction with the first.

In *Addison v. State*, 3 Tex. Ct. App. 40, the indictment charged the theft of three different animals belonging to different persons, but averred them to have been taken from the possession of one person holding the animals for their respective owners, and it was averred in the indictment that the theft was one and the same act, done at the same time and place, without the consent of the person holding the property. The indictment was held to be sufficient, and it was also held that "the taking of several articles or animals at the same time and place constitutes one offense, whether the several articles or animals belonged to the same person or to different persons." This, we are of opinion, still is the law of theft in Texas, settled on authorities conclusive in their nature.

In the case under consideration, under the pleading and the evidence, do the proofs show that the theft charged in the two indictments constituted separate offenses, or were they but parts of a single transaction, and did the court properly submit this question to the consideration of the jury?

In the general charge the jury were instructed to this effect: "If you are satisfied from the evidence adduced that the gold watch mentioned in this indictment was taken, if taken at all, at the same time and place, and from the possession of the same person, as the articles enumerated in the copy of the indictment attached to defendant's special plea of former conviction, then you will find said plea to be true, and say by your verdict, 'We, the jury, find defendant's plea of former conviction to be true, and find defendant not guilty.' If the evidence satisfies you that the gold watch mentioned in this indictment was not taken from the possession of the same person as the articles mentioned in the indictment in case No. 344, or was not taken at the same time or from the same place, you will find defendant's plea of former conviction to be untrue."

On the same subject the court gave, as shown by the bill of exceptions, at the request of counsel for the defendant, the following instruction: "When a variety of articles are stolen at the same time, and from the same place, and from the same or different per-

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sons, it is only one offense." This instruction was given with the following qualification: "The proof must show, before the jury can consider a transaction to constitute only one offense, that the articles stolen were in possession of the same party, and taken from the same place and at the same time, and if any reasonable space of time elapses between the taking of one and the taking of the other articles, or they are taken from different places, it will be two distinct offenses." The defendant's counsel excepted to this qualification appended to the charge asked by the counsel and given by the court. The whole subject is thus narrowed down to this point: Was there error in the qualification made by the judge to the special charge given at the request of the defendant's counsel? As we have seen, the court, in its general charge as to the plea of former conviction, required the jury to find, in order to support the plea and acquit on this ground, that the property mentioned in the second indictment was taken from the possession of the same person, or was that mentioned in the first indictment; which went beyond what we deem the law to be. In order to correct this error, counsel for the defendant requested the court to give to the jury a charge evidently intended to correct that particular error, and embracing the idea that it was not necessary that the proof must show that the gold watch was taken from the possession of the same person as the other property in order to support the plea, but that "when a variety of articles are stolen at the same time and from the same place, and from the same or different persons, it is only one offense."

The special charge was a part of the law of the case, and enunciated the correct doctrine when considered in the light of the evidence, agreeably to the authorities hereinbefore cited; and if it had been given as requested, without modification, it would have tended to correct the error in the general charge. But when the qualification given by the judge was added, its effect was to neutralize the effect of the special instruction, and leave the jury still at liberty to find against the plea, unless they believed that the articles mentioned in the two indictments were in the possession of the same party at the time they were stolen. The qualification of the charge asked by the defendant's counsel was error to the prejudice of the defendant, and for this error, it being excepted to at the time, the settled rule of practice in such cases requires a reversal of the judgment. *Bishop v. State*, 43 Tex. 390.

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In order to avoid misapprehension, it may be well to say that when various articles are stolen at the same time and place, the transaction is not divisible, but is one transaction, and that a prosecution for the theft of a portion of the articles so taken would bar a prosecution for the theft of another portion of the same articles, whether the property belonged to or was in the possession of the same person or different persons. But we must not be understood as holding that different articles taken from different persons and from different places, as from different rooms of a house occupied by different persons, would necessarily be one transaction; but on the contrary, that property thus situated would, on proper averments and proof, support different prosecutions. For example, if a thief should enter the room of one lodger at a hotel, and should there perpetrate a theft, and should then pass to the room of another lodger and there commit another theft, these would be different thefts, and each might be prosecuted separately, and a conviction or an acquittal for the one would be no bar to the prosecution for the other. So, in case of one horse being taken from the inclosure of A., and another from the enclosure of B., these would be separate offenses. What the law prohibits is the cutting up of one transaction into different offenses, and holding one accused liable for more than one penalty when there has been but one violation.

For error in the charge of the court, as above indicated, the judgment will be reversed and the cause remanded.

Reversed and remanded.

DUNLAP V. STATE.

(9 Tex. Ct. App. 179.)

Jurisdiction — court sitting on holiday.

In the absence of express prohibition courts may sit on legal holidays.

CONVICTION of murder. The opinion states the point.

Thomas Ball, assistant attorney-general, for State.

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WINKLER, J. [Omitting other matters.] With regard to the objection of the defendant to being put on trial on the first day of January, on the ground that that day was a legal holiday, we are of opinion that he was not deprived of any legal or substantial right by the action of the court. Whilst it is true that by statute of this State certain days, and among them the first day of January, are declared holidays, on which all the public offices of the State may be closed, and shall be treated and considered as Sunday, or the Christian Sabbath, for all purposes regarding the presenting for payment or the acceptance, and of protesting for and giving notice of the dishonor of bills of exchange, bank checks, and promissory notes placed by law upon a footing of bills of exchange, and that all the exemptions and requirements usual on legal holidays may be observed on the several days named in the statute as holidays; and whilst provision is made for the observance of the holiday, should the day named fall on Sunday, and for the presentation, etc., of negotiable paper in such state of case (Rev. Stats. arts. 2835, 3837), we fail to find, that by word or implication, our law-makers ever intended that the courts of the State should suspend proceedings on the days named as legal holidays, except at their own discretion, or that those days are assimilated to Sunday, or the Christian Sabbath, except in relation to civil matters, such as the presentation of negotiable paper for acceptance or payment, protest, and the like. To the extent that holidays have been assimilated to Sunday by statute they must be enforced, but we apprehend, no further. They are not to be held the same as the Sabbath day, or as not a day for judicial or legal proceedings, as the Sabbath is denominated. *Dies Dominicus non est juridicus*. Broom's Leg. Max. With us, the rights, duties, and privileges of the citizen, as well as what duties may be performed by courts and officials, are regulated by statute law; but we nowhere find, that except as above stated, the general provisions of the statutes respecting the Sabbath, or Sunday, are to be applied to legal holidays. In the present case it appears by the record that the day of the week on which the trial commenced was not Sunday but Thursday. We are of opinion the court did not err in refusing to further postpone the trial because the day was, under the civil statutes, a legal holiday.

Judgment affirmed

HOLBERT V. STATE.

(9 Tex. Ct. App. 219.)

Evidence — impeachment of witness — form of questions.

It seems that in impeaching the character of a witness for truth by proof of his general reputation, if the impeaching witness states that his reputation is bad, the proper inquiry is whether in view of his reputation he is worthy of belief on oath, and not whether the impeaching witness would believe him.

The question cannot be raised for the first time on the argument or charge.

CONVICTION of assault with intent to murder. The opinion states the point.

W. K. Homan, for appellant.

Thomas Ball, assistant attorney-general, for State.

WINKLER, J. It is shown by bill of exceptions, that "the defendant having introduced testimony for the purpose of impeaching the State's witness, Barnes Parker, the district attorney in his closing argument to the jury argued that they could not regard the said Parker as having been impeached, because the impeaching witness, though testifying that the general reputation of said Parker for truth and veracity in the community where he lives is bad, had not been asked whether from such reputation the said Parker is entitled to be believed on oath. Wherefore, after the conclusion of the argument to the jury, the defendant by his counsel asked the court to instruct the jury that the regular mode of impeaching a witness is to inquire of the impeaching witness whether he knows the general reputation of the person in question among his neighbors, and what that reputation is, and it is not competent for the impeaching witness to give his opinion as to whether or not the person in question is entitled to credit on his oath." The court declined to instruct the jury as requested, and counsel for the defendant took a bill of exceptions to the ruling of the court.

[Omitting minor matters.]

We are of opinion that the matters complained of relate to a matter which had but one appropriate place on the trial. If it was

intended to raise a question as to the extent of the evidence of the impeaching witnesses, the proper time and opportunity was afforded the parties whilst the witnesses were on the stand. If it had been intended to invoke a ruling of the court as to whether the examination should be confined to the general character of the witness sought to be impeached, for truth and veracity among his neighbors, or whether it should be extended to the opinion of the respective witnesses as to whether they would consider his oath entitled to credit or not, that matter could have been settled by propounding to the witnesses such appropriate questions as would have elicited a direct answer. In such a case, an objection being raised to the question and the answer sought to be elicited, the court would have been required to rule; and by a bill of exceptions which properly presented the subject, signed by the judge, or in the manner required by law for perpetuating the fact in case of a refusal of the judge to certify, the question would have been presented in a manner required by law, and would not only have invoked a ruling by this court, but would have so presented the question as that this court could have acted understandingly in deciding the question.

In the present case, agreeably to the bill of exceptions, the question seems to have been raised for the first time by the district attorney in his concluding argument, which seems to have been followed by a charge asked by counsel for the defendant, and which the court refused to give to the jury. The controversy seems to be this: The district attorney took the position in argument that the State's witness had not been successfully impeached, for the reason that the impeaching witnesses had not been asked whether, from the general reputation of the State's witness, he "is entitled to be believed on oath;" whilst the charge asked by the defendant's counsel assumes the law to be that the impeaching witnesses should be confined to the general reputation of the witness whose testimony is sought to be impeached, and that it is not competent for the impeaching witness to give his opinion as to whether or not the person in question is entitled to credit on his oath. It will readily be perceived that the precise question involved is as to the extent to which the examination of the impeaching witnesses should be extended. We are of opinion, as already intimated, that this is a question which could not be legitimately raised for the first time either in argument or by a charge to the jury; that it should have been raised on the examination of the witnesses, and not having been

done then, it was too late to raise it at some subsequent stage of the proceedings. We are therefore of opinion that there is no such error presented by the bill of exceptions as worked any injury to the rights of the defendant.

It may not be amiss, however, in view of the argument of counsel for the appellant, to say that, in our view of the authorities, the general rule as laid down by Mr. Greenleaf in his work on Evidence (vol. 1, § 461) is not sustained to the extent to which the author goes. He says that the regular mode of examining into the general reputation of a witness whose testimony it is sought to impeach is to inquire of the witness whether he knows the general reputation of the person in question among his neighbors, and what that reputation is. He then says that in the English courts the course is further to inquire whether, from such knowledge, the witness would believe the prisoner upon his oath. The authorities, so far as examined, seem to support this statement as to the course pursued in the English courts. Phil. & Am. on Ev. 925; *Manson v. Hartsink*, 4 Esp. 104; 1 Stark. on Ev. 182; *Carlos v. Brook*, 10 Ves. 50. To this extent there seems to be but little controversy. The learned author, however, makes this further statement, following in immediate connection with what is said as to the rule in the English courts, as quoted above. "In the American courts the same course has been pursued, but its propriety has of late been questioned, and perhaps the weight of authority is now against permitting the witness to testify as to his own opinion."

This latter expression, as to the propriety of the English rule having of late been questioned, and that perhaps the weight of authority is now against permitting the witness to testify as to his opinion, has itself been not only questioned as not a correct enunciation of the law, but in very many American courts the contrary course has been pursued. Notably in Texas is the case of *Boons v. Weathered*, 23 Tex. 675, determined by the Supreme Court of the State in 1859. In that case, whilst the position assumed by Mr. Greenleaf is not mentioned, quite a number of authorities are cited and reviewed, and the conclusion seems finally to be reached that in impeaching the character of a witness the inquiry must be directed to his general character for truth, and not to his general character in other respects, and that the English rule, which permits the impeaching witness to be further interrogated whether he could or could not believe the one sought to be impeached on oath is in

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some form a proper one. We make the following quotation from the opinion: "When the impeaching witness is asked whether or not he could believe the other on oath, he is more likely to give an answer suggested by his personal knowledge, or prompted by his personal feelings, or his individual opinion, than when asked whether or not he is acquainted with the general reputation of the former witness for truth in the community where he lives. He may then properly be asked whether that general reputation is such as to entitle the witness to credit on oath; or any other form of words may be used which do not involve a violation of the cardinal principles that the inquiry must be restricted to the general reputation of the impeached witness for truth in the community where he lives or is best known, and that the impeaching witness must speak from general reputation or report, and not from his own private opinion. I think these conclusions are sound upon principle, and are supported by the most numerous and best considered authorities." We might rest our investigation with the case of *Boons v. Weathered*, as the leading case in Texas on the subject under consideration, and on *Johnson v. Brown*, 51 Tex. 65. But the authorities at hand lead us to conclude that the rule of Mr. Greenleaf as to the doctrine of American courts on the subject fails of the support the authorities generally give to his deductions. In *Hamilton v. People*, 29 Mich. 195, CAMPBELL, J., delivering the opinion of the court, says: "Until Mr. Greenleaf allowed a statement to creep into his work on Evidence, to the effect that the American authorities disfavored the English rule, it was never seriously questioned;" citing 1 Greenl. on Ev., § 461. Judge CAMPBELL proceeds: "It is a little remarkable, that of the cases referred to, to sustain this idea, not one contained more than a passing *dictum*, not in any way called for." He proceeds to review the case as to what was involved in each, and then says: "The jury, if they do not act from personal knowledge, cannot understand the matter at all without knowing the witness's opinion and the ground on which it is based. It is the same sort of difficulty which arises in regard to insanity, to disposition or temper, to distances and velocities, and many other subjects, when a witness is required to show his means of information, and then state his conclusions or belief based on those means. If six witnesses were merely allowed to state that a man's reputation is bad, and as many say it is good, without being questioned further, the jury cannot be said to know

much about it. Nor would any cross-examination be worth much unless it aided them in finding out just how far each witness regarded it as tainted." In another paragraph of the opinion, the same judge further says: "So far as the reports show, the American decisions, instead of shaking the English doctrine, are very decidedly in favor of it, and have so held upon repeated and careful consideration; and we have not been referred to, nor have we found, any considerable conflict." He cites in New York, *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122; *People v. Rector*, 19 Wend. 569; *People v. Davis*, 15 id. 602. In New Hampshire, *Titus v. Ash*, 4 Fost. 319. In Pennsylvania, *Bogle's Executors v. Kreitzer*, 46 Penn. St. 465; *Lyman v. Philadelphia*, 56 id. 488; and other cases in Maryland, California, Illinois, Wisconsin, Georgia, Tennessee, Alabama, Kentucky, and in United States Circuit Reports—as, for instance, *United States v. Van Sickle*, 2 McLean, 219.

We have had access to a later decision of the same court, in which the opinion was by the same judge as in *Hamilton's* case (*Keator v. People*, 32 Mich. 484, decided in 1875), where the ruling in *Hamilton's* case seems to have been reaffirmed.

The authorities, both in Texas and elsewhere in America, seem clearly to support the position that on the subject of impeaching a witness the rule is the same, both in England and in America, and that the rule of the English courts is the true rule of the common law, both there and here.

All general rules are liable to exceptions, based upon peculiar circumstances. We are, however, of opinion the following general rules may be safely deduced from the authorities: When it is sought to impeach the character of a witness who has testified, by proving his general bad character by other witnesses, the course is to first interrogate the impeaching witness as to the former's general reputation for truth among his associates, or where he resides or is best known. Should he be conversant with that general character for truth, he may then be questioned as to whether it is good or bad, and the witness appearing to be sufficiently acquainted with the character of the witness it is proposed to impeach, to testify thereto, and stating that the general reputation for truth is bad, he may then be further interrogated whether the impeached witness is worthy of belief on oath, and not whether he would believe him; that impeaching witnesses may be cross-examined as other witnesses, and with the same latitude, and that the witness whose credibility

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is thus attacked may have his general character strengthened by other evidence; that it is not competent in investigations of this character to inquire into the general character of the witness to be impeached, except as to his general reputation for truth. A witness must speak from knowledge derived from general reputation, and not from his individual knowledge.

[Omitting minor matters.]

Judgment affirmed.

ROLAND V. STATE.

(9 Tex. Ct. App. 277.)

Criminal law — witness — husband and wife.

Under a statute permitting husband and wife to testify against one another on a criminal prosecution for an offense committed by one against the other, the one may testify against the other on an indictment of the other for adultery. (See note, p. 744.)

CONVICTION of adultery. The opinion states the case.

A. T. Burk, for appellant.

Thomas Ball, assistant attorney-general for State.

WINKLER, J. We have carefully considered the various questions of moment to be determined. It is shown by the record, that the defendant being on trial, charged with living in adultery with one George Willis, the State offered to prove by the husband the marriage of the defendant. When the trial was had (January 6, 1880) the Revised Codes had gone into effect, and so far as this question is concerned, being a matter of procedure, it must be determined thereby. The appellant invoked in the court below, and is entitled here to whatever benefits she may be entitled to under art. 735 of the Code of Procedure, as follows: "The husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other."

If to live in adultery be an offense against the matrimonial spouse,

then the State was entitled to the testimony, agreeably to the plain import of the language cited. That it is an offense against the husband for the wife to live in adultery with another man will hardly admit of question. That this identical question has been settled in this State against the views of the appellant, see *Morrill v. State*, 5 Tex. Ct. App. 447, decided under a statutory provision identical with that cited above. The court did not err in overruling the defendant's objection to the admissibility of the husband to testify against the wife when charged with living in adultery with another man.

Finding no material error, the judgment is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — The same doctrine was held under a precisely similar statute in *State v. Bennett*, 31 Iowa, 25. The court said: "Is the adultery of the wife in such sense a crime committed against the husband as to render him under this section a competent witness against her in a criminal prosecution for the offense? This question is one of first impression. Although many similar cases have been before this court, in which the testimony of the husband or wife was admitted, the competency of such testimony was always tacitly conceded.

"The law so far regards the adultery of the wife as a crime against the husband, that if he should discover her *flagrante delicto* his homicide of her and her paramour would be lowered to the grade of manslaughter. The general sense of mankind, however, considers the crime of a more aggravated character. The history of judicial proceedings in this country of late years fails to furnish an instance in which a jury has found the homicide of the paramour of the wife guilty of any crime at all. And while this tendency upon the part of jurors to override the law cannot receive judicial sanction, yet it furnishes convincing proof of the fact that the law does not punish the crime of adultery in a manner proportionate to the magnitude of the offense, and that a law not in accord with the common feelings and sympathies of humanity cannot be enforced. The Revision, § 4347, which provides that no prosecution for adultery can be commenced but on complaint of the husband or wife, leads to the inference that the offense is rather a crime against the partner to the marital relation than against society in general. So long as the injured husband or wife suffers the wrong in silence, society, notwithstanding the injury to public morals, is without redress. The prosecution can be commenced only on complaint of the husband or wife. The only mode of commencing the prosecution is by becoming a prosecuting witness before the grand jury, or by filing an information before a committing magistrate. When a preliminary information is laid before a magistrate he must examine the informant or prosecutor, and any witness he may produce, and take their affidavits in writing, and cause each affidavit to be subscribed and sworn to before him by the person making it. The affidavit must set forth the facts stated by the informant and his witnesses tending to establish the commission of the offense, and the guilt of the person charged therewith. Rev., §§ 4531, 4533. The informant assumes the attitude of a witness whether he institute the prosecution before the grand jury or before a committing magistrate. The argument which, under section 3893, would deny the right of the husband to testify in this case, would also deny his right to commence the prosecution either before a committing magistrate or the grand jury, and would prove too much. It has been held that an affidavit of a married woman might be read on an application to the Court of King's Bench for an information against her husband for attempt to take her away by force after articles of separation. In reference to this Mr. Justice BULLER said: 'It would be strange to permit her to be a witness to ground a prosecution, and not afterward to be a witness at the trial. 11 Bull. N. P. 267; 1 Phill. on Ev. 79. In our opinion the witness was improperly excluded.'

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(9 Tex. Ct. App. 619.)

Criminal law — evidence — declarations as res gesta.

On a trial for murder, a witness for the prosecution testified that he saw the deceased when he fell shot, from a distance of one hundred and fifty yards; immediately went to him, and asked him how he shot himself; and the deceased replied, "I did not do it, I was shot from up yonder," motioning toward a neighboring mountain. *Held*, competent, as part of the *res gesta*. But proof of the contemporaneous declaration by the deceased that he knew G. W. shot him, for he had threatened him, *held*, incompetent.*

CONVICTION of murder. The opinion states the point.

N. G. Shelly, Sheeks & Sneed and W. H. D. Carrington, for appellant.

Thomas Ball, assistant attorney-general, for State.

WHITE, P. J. When the witness, Luckett, who was one hundred and fifty yards off, heard the shot and saw the deceased fall, he immediately went to the spot and asked the deceased, "How in the world did you shoot yourself?" To which the deceased answered, "I did not do it; I was shot from up yonder," meaning by "up yonder" from the side of the mountain, as the witness understood from some motion then made by deceased. These declarations were *res gesta*, and properly admitted, and it was not necessary that a predicate should first have been laid for their introduction as dying declarations. "Where the declarations of the injured party are part of the *res gesta*, they are admissible without proof of a consciousness of approaching death." Whart. Cr. Ev. (8th ed.), § 296. But it is objected that the witness should not have been allowed to state that by "up yonder," from a motion made by deceased, he understood him to mean from the side of the mountain. It is to be noted that before Luckett was put upon the stand as a witness, a proper predicate had been laid through the witness Estes to prove dying declarations; so that this portion of Luckett's evidence was,

* To same effect *Feld v. State* (37 Miss. 474), 34 Am. Rep. 476, and note, 478.

in fact, both *res gestæ* and dying declarations. With regards to dying declarations, the rule is that "it is not essential to admissibility that the statement should be formally expressed in words. T., being at the point of death, and conscious of her condition, but unable to speak articulately in consequence of wounds inflicted upon her head, was asked whether it was C. who inflicted the wounds; and if so, she was requested to squeeze the hand of the person making the inquiry. It was held that under all the circumstances of the case, there was proper evidence against C. for the consideration of the jury, they being the judges of its credibility, and of the effect to be given to it." *Id.*, § 293. "And signs made by deceased have been admitted, when they go to affirm a prior formal statement." *Id.*, § 287. Whilst it is true that dying declarations are admissible only as to those things to which the deceased would have been competent to testify if sworn in the cause, and must therefore speak to facts only, and not to mere matters of opinion (1 Greenl. on Ev., § 159; *Lister v. State*, 1 Tex. Ct. App. 739), the testimony objected to was a fact of which the deceased could have testified, had he been upon the stand; for it certainly would have been permissible to allow the witness upon the stand to testify that he was shot from the side of the mountain.

But there was error in permitting the proof of the other declarations of the deceased which were objected to. This relates to what occurred, and the statement made afterward to the witness, Box. When Box arrived, he said to deceased, "Who do you think shot you?" to which the deceased replied, "I know George Warren shot me, for he threatened me." And this same objection, as we will see, goes to a portion of the evidence of Luckett, as to what occurred after Estes reached the dying man. "Estes approached and took hold of the hand of the deceased, and the deceased said to Estes, 'He has got me.' I (the witness) then asked Estes, 'who does he mean by saying, 'He has got me?'' Estes replied, 'He means George Warren, for he has threatened both of us.'"

"Dying declarations are admitted, from the necessity of the case, to identify the prisoner and the deceased, to establish the circumstances of the *res gestæ*, and to show the transactions from which the death results. When they relate to former and distinct transactions, they do not come within the principle of necessity. Therefore, it seems that dying declarations by a party that the

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prisoner had two or three times previously attempted to kill him, are not admissible. And so they are inadmissible when they go to show old malice on the part of the prisoner to the deceased." Whart. Cr. Ev., § 278. "Nothing can be evidence in a declaration *in articulo mortis* that would not be so if the party were sworn. On this rule, any thing the murdered person says as to facts is receivable, but not what he says as matter of opinion or belief. Hence the declaration, 'It was E. W. who shot me, though I did not see him,' is inadmissible. *Id.*, § 295; *Nelson v. State*, 7 Humph. 542. And where the deceased had been shot at night by some unknown person, his dying declarations, to the effect that the prisoner, who was one of his employer's slaves, was the only slave on the place who had enmity against him, were held incompetent and inadmissible evidence as against the prisoner. *Moss v. State*, 35 Ala. 422.

A like objection holds good to that portion of Lockett's testimony as to Estes' reply when he (the witness) asked Estes whom the accused meant when he said, "He has got me," and Estes' reply, "He means George Warren, for he has threatened both of us." If this testimony was inadmissible had it come directly from the mouth of deceased, as we have seen would have been the case from the above authorities, *a fortiori* it is much more objectionable when coming from a third person, and that, too, as mere inference or opinion of such person as to his meaning. *McHugh v. State*, 31 Ala. 317; *Barnett v. People*, 54 Ill. 325.

[Omitting other matters.]

Reversed and remanded.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

MASLIN V. BALTIMORE AND OHIO RAILROAD COMPANY.

(14 W. Va. 180.)

Carrier — drover's pass — special contract.

A common carrier, transporting cattle for hire, and the shipper on a free pass for the purpose of taking care of the cattle, is a common carrier as to both, and cannot by special contract exempt himself from liability for his own negligence or that of his servants.

ACTION against a common carrier for injury to cattle in transit. The opinion sufficiently states the point. Judgment below for plaintiff.

C. Boggess and Baylor & Wilson, for plaintiff in error.

W. H. H. Flick, for defendant in error.

GREEN, President. [Omitting other matter.] When a common carrier transports a passenger or freight free of charge, the exemptions for which he may justly and reasonably stipulate, may be perhaps greater than when he transports for hire. It is unnecessary however to consider this question in this case, as the common

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carrier in this case transported for hire. It is true, the agent of the plaintiff was permitted for the purpose of taking care of the cattle on the train to travel on the cars on a free pass, but as pay was taken for the transportation of the cattle, and the contract for the transportation of this agent and the cattle must be regarded as one contract, this contract was for transportation for hire, and this agent as well as the cattle must be held as transported for hire. See *Cleveland Railroad Co. v. Curran*, 19 Ohio St. 1, 12, 13; s. c., 3 Am. Rep. 362; *Pennsylvania Railroad Co. v. Henderson*, 51 Penn. St. 315; *Railroad Co. v. Lockwood*, 17 Wall. 384; *Virginia and Tennessee Railroad Co. v. Sayers*, 26 Gratt. 328.

The views above expressed are substantially those held by the Supreme Court of the United States in the case of *Railroad Co. v. Lockwood*, decided in 1873; and they are sustained by the weight of authorities. The old English authorities held special stipulations against liability for negligence or misconduct illegal and void. Thus in the Doctor and Student, Dialogue 2028, speaking of a common carrier it is said: "If he would refuse to carry articles delivered for carriage, unless promise were made unto him, that he shall not be charged for misdemeanor that should be in him, the promise was void, for it was against reason and against good manners, and so it is in all other cases like," and this passage is quoted by Noy in his maxims at law. Noy's Maxims 92. Stevens in his Commentaries, vol. 2, p. 135, states, that a common carrier's liability might by special contract be varied, but the law would still hold him responsible for negligence and misconduct.

This remained the law in England as late as the year 1832. Mr. Justice BLACKBURN, in the case of *Peek v. North Staffordshire Railway Co.*, 10 H. L. Cas. 494, states, that common carriers could not by the English law as formerly established by the weight of authority, by any special agreement, exempt themselves from all responsibility, so as to evade altogether the salutary policy of the law. They could not by a special notice exempt themselves from all responsibility in cases of gross negligence and fraud, or by demanding an exorbitant price compel the owner of goods to yield to unjust and oppressive limitations of his rights. And the carrier would be equally liable in case of the fraud or misconduct of his servants, as he would be in case of his own personal fraud or misconduct. But as stated by Justice BLACKBURN, after that time it was held that a carrier might by a special notice make a contract

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limiting his responsibility even in the case of gross negligence, misconduct or fraud on the part of his servants. The cases from which Justice BLACKBURN deduces this conclusion, that this was substantially the holding of the English courts subsequently to 1832, are: *Wyld v. Pickford*, 8 M. & W. 443; *Hinton v. Diblin*, 2 Q. B. 646 (46 E. C. L. 847); *Shaw v. York and North Midland Railway Co.*, 13 Q. B. 347; *Austin v. Manchester, Sheffield and Lincolnshire Railway Co.*, 16 Q. B. 600; *Chippendale v. Lancashire and York River Railway Co.*, 21 L. J. (N. S.) Q. B. 22; *Austin v. Manchester, Sheffield and Lincolnshire Railway Co.*, 10 C. B. 454; *Carr v. Lancashire and Yorkshire Railway Co.*, 7 Exch. 707; *Great Northern Railway Co. v. Morville*, 21 L. J. (N. S.) Q. B. 319; *York, Newcastle and Berwick Railway Co. v. Crisp*, 14 C. B. 527; *Hughes v. Great Western Co.*, id. 637; *Slim v. Great Northern Railway Co.*, id. 647.

In the case of *Carr v. Lancashire and Yorkshire Railway Co.*, 7 Exch. 707, the defendant had received a horse to be carried for him in a horse box, subject to conditions at the foot of a ticket for the conveyance of a horse, in these words: "This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage (however caused) occurring to live stock of any description traveling upon the Lancashire and Yorkshire Railway Company, or in their vehicles." The horse was killed, as the jury found, by the gross negligence of the defendant. Yet the court held, that the plaintiff was not entitled to a judgment. Baron PARKE concluded his judgment thus: "It is not for us to fritter away the true sense and meaning of these contracts merely with a view to make men careful. If any inconvenience should arise from their being entered into, this is not a matter for our interference, but it must be left to the legislature, who may, if they please, put a stop to this mode which carriers have adopted of limiting their liability." This case was decided May, 1852.

In the case of *Walker v. York and North Midland Railway Co.*, 2 El. & Bl. 750, decided in 1853, the facts were these: The defendant had caused notices to be served personally on a number of fishermen at Scarborough, stating that they would not carry fish except subject to certain conditions limiting their responsibility. The fishermen made much objection to this. The notices were torn up; and something of a riot occurred. The court instructed

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the jury, that they might draw the inference from the service of the notice and the plaintiff subsequently sending the fish, unless the plaintiff had unambiguously refused to deliver the fish on the terms of the notice, and the defendant had acquiesced in that refusal. The verdict was for the defendant; and it was sustained by the Court of Queen's Bench.

The railroad companies under these decisions were enabled in a great measure "to evade altogether the salutary policy of the common law."

To correct this course of decisions Parliament enacted the 7th section of the Railway and Traffic Acts of 1854, which is found much fault with on account of its obscurity; but when these previous decisions are considered, the intention of the legislature seems clear enough. So much of this section as bears upon the present discussion is in these words: "Every such company as aforesaid shall be liable for the loss of, or for any injury done to, any horses, cattle, or other animals, to any articles, goods, or things, in the necessary forwarding and delivery thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration made or given by such company contrary thereto, or in any wise limiting such liability, every such notice, condition or declaration being hereby declared null and void. Provided always that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding and delivering of any of the said animals, articles, goods or things as shall be adjudged by the courts or judges, before whom any question relating thereto shall be tried, to be just and reasonable. Provided also that no special contract between such company and other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods or things as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him, or by the person delivering such animals, articles, goods or things, respectively, for carriage."

Much controversy has arisen in the English courts in construing this act, which is certainly inartificially drawn and badly expressed. Thus it has been said by some judges, that a condition incorporated in a signed contract was not within the enactment in the beginning of this 7th section, etc. *Pardington v. South Wales Railway Co.*, 1 H. & N. 392.

The true construction of this act is thus given by Lord Chief Justice JERVIS: "The fair meaning of this section, as it seems to me, is this: the first branch of it declares, that all notices, conditions and declarations made and given by the company shall be null and void, in so far as they go to relieve the company from liability for loss or injury to goods, etc., in the receiving, forwarding and delivery thereof, occasioned by the neglect or default of the company or its servants. But then it goes on to provide in the next branch, that this shall not prevent the company from making such conditions, which shall be adjudged by the court or judge before which any question relating thereto shall be tried, to be just and reasonable, and further though just and reasonable, such condition and special contract shall not be binding, unless signed by the person sending or delivering the goods."

This construction was adopted by the Queen's Bench in *Peck v. North Staffordshire Railroad Co.*, and by the Exchequer Chamber in *McManus v. Lancashire & Yorkshire Railway Co.*, and was approved in *Peck v. North Staffordshire Railroad Co.*, in the House of Lords. See 10 H. of L. 478. So construed, so much of this act as declared that the special contract made by the shipper with the common carrier relieving it from any portion of its common-law liability must be just and reasonable in law, or otherwise it should be void, was nothing but an affirmation of common-law principles as held prior to the recent English cases made after the year 1832.

Various decisions have been rendered in England since the passage of this act, as to what exemptions by special contract are just and reasonable. The act was passed specially with reference to those exemptions by special contract of all loss or damages by negligence of the servants of common carriers. This exemption under this act is of course unjust and unreasonable. But it is held, that there are other exemptions which are also unjust and unreasonable, and therefore void, though provided for by special contract.

I shall not review the English cases on this subject further than to state that in *Peck v. North Staffordshire Railway Co.*, 10 H. of L. 478, it was held, that an exemption by special contract from loss or damage to marble chimneys, unless their value was declared, and they were insured, the rate of insurance being fixed at 10 per cent on their declared value, was an unreasonable and unjust exemption and therefore void.

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In New York the same inconsistent course of decisions has been followed as in England. For a long time the New York courts resisted the attempts of common carriers to limit their common-law liability, except for the purpose of procuring a disclosure of the character and value of articles liable to extra hazard and risk (*Cole v. Goodwin*, 19 Wend. 257, and *Gould v. Hill*, 2 Hill, 623); they then advanced somewhat, extending the right of common carriers to exempt themselves from common-law liability by special contract, the position maintained by them then being thus stated by Judge CAMPBELL in *Dorr v. New Jersey Steam Navigation Company*, 4 Sandf. 136, decided in 1850. He says: "A common carrier has two distinct liabilities, the one for loss by accident and mistake, when he is liable as an insurer; the other for losses by default or negligence, when he is answerable as an ordinary bailee. It would certainly seem reasonable that he might, by express special contract, restrict his liability as insurer, that he might protect himself against misfortune, even though public policy should require that he should not be permitted to stipulate for impunity where the loss occurs from his own default or neglect of duty."

In apparent accord with these views were the decisions in the cases of *Parsons v. Monteath*, 13 Barb. 353, and *Moore v. Evans*, 14 id. 524.

In 1858 the Supreme Court advanced still further in the same direction, and held in *Wells v. New York Central Railroad Co.*, 26 Barb. 641, that in case of a gratuitous passenger traveling on a free ticket a common carrier may stipulate against responsibility for negligence of its servants. And this judgment was affirmed by a majority of the Court of Appeals, 24 N. Y. 181. This decision was followed in *Perkins v. New York Central Railroad Co.*, 24 id. 196; and it was held that this exemption might be extended to all kinds of negligence of its agents, gross as well as ordinary. A considerable controversy then arose as to whether a drover, who had a free pass to enable him to go with and care for his cattle, which were being transported for him, was to be regarded as a free passenger under this rule which had been laid down; and the judges were much divided in opinion on the question.

This controversy was decided by the judgment of the Court of Appeals in *Bissell v. New York Central Railroad Co.*, 25 N. Y. 442, the majority of the court, four judges against three, holding that a drover in such case was to be regarded as a free passenger.

In this case they on this point reversed the decision of the case by the Supreme Court. See 29 Barb. 602. Nor was this decision in consonance with the decision in *Smith v. New York Central Railroad Co.* See 29 Barb. 132, and 24 N. Y. 222. Subsequent New York decisions have not only followed this decision, but have carried the right of a common carrier to exempt itself from its common-law liability still further; and it may now be regarded as settled in New York that a common carrier for hire may by special contract exempt itself from all responsibility or loss arising from the negligence of its servants, though this negligence be gross. See *Poncher v. New York Central Railroad Co.*, 49 N. Y. 263; *Cragin v. New York Central Railroad Co.*, 51 id. 61; s. c., 10 Am. Rep. 559; *Magnin v. Dinsmore*, 56 N. Y. 168; *Steers v. Liverpool, New York and Philadelphia Steamship Co.*, 57 id. 1; s. c., 15 Am. Rep. 453.

But even in New York it is held that while a common carrier may stipulate for exemption from liability for losses occurring through his negligence, yet his contract will not be construed to contain such exemption unless it is so expressly agreed. *Magnin v. Dinsmore*, 56 N. Y. 168.

The New York cases were carefully reviewed by the Supreme Court of the United States in *Railroad Co. v. Lockwood*, 17 Wall. 357, and the modern New York cases were disapproved.

There are cases in some of the other States in which dicta of judges and some decisions either follow or favor more or less these modern New York decisions. In *Ashmore v. Pennsylvania Steam Towing Transportation Co.*, 28 N. J. 180, the question we are considering was much discussed, but a decision of it, the court considered, was not properly involved in the case, and it was therefore waived. And in *Kinney v. Central R. R. Co.*, 32 N. J. 407; 34 id. 513; s. c., 3 Am. Rep. 265, it was decided that a contract that in consideration of a free passage a passenger will assume the risk of injuries to his person from the negligence of the servants of a railroad company is valid in law, but the court expressly waives deciding whether such a contract with a passenger who paid fare would or would not be valid.

In the case of *Lawrence v. New York, Providence and Boston R. R. Co.*, the special contract contained in the bill of lading provides "that no responsibility will be admitted under any circumstances to a greater amount upon any single article of

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freight than \$200, unless upon notice given of such amount and a special agreement therefor;" and no negligence on the part of the railroad company or its agents appearing, it was held that such contract as to the amount of the recovery was binding.

In *Kimball v. Rutland and Burlington Railroad Co.*, 26 Vt. 247, it was held that a common carrier may by special contract with a shipper so change his relations as to become a private carrier, and in such case he cannot be sued as a common carrier.

In *Illinois Central Railroad Co. v. Morrison*, 19 Ill. 136, it was held that a common carrier might enlarge or diminish his liability by express contract, but not so as to exempt itself from gross negligence or willful misfeasance of duty. And the same was held to be the law in *Illinois Central Railroad Co. v. Adams*, 42 id. 474, in which case it was held that the failure of the conductor of a train to throw water on hogs being transported, which were in danger of dying from heat, was gross negligence, and no contract could protect the railroad company from liability therefor.

In *Hawkins v. Great Western Railroad Co.*, 17 Mich. 57, and s. c., 18 Mich. 427, the court held, that a contract resembling the one in this case did not relieve the company, where the injury resulted from the insufficiency of the flooring of the cars and their breaking through during the transportation of the cattle, the contract being silent on the subject of the cars to be furnished; and that a suit against the company as common carriers was proper.

In the *B. & O. R. R. Co. v. Brady*, 32 Md. 333, the court laid down the general proposition, that by express contract a railroad company may limit its responsibility as a common carrier, but says nothing about the effect of negligence on their part.

These decisions and the *dicta* of judges in them give perhaps some countenance to the recent New York decisions; but the great mass of the American authorities are in direct and irreconcilable conflict with these recent New York cases. Thus in Pennsylvania it is settled by a long course of decisions that a common carrier cannot limit his liability so as to cover his own or his servant's negligence. See *Farnham v. Camden and Amboy Railroad Co.*, 55 Penn. St. 53; *Laing v. Colder*, 8 id. 479; *Camden and Amboy Railroad Co. v. Baldauf*, 16 id. 67; *Goldey v. Pennsylvania Railroad Co.*, 30 id. 242; *Powell v. Same*, 32 id. 414; *Pennsylvania Railroad Co. v. Henderson*, 51 id. 315; *Express Co. v. Sands*, 55 id. 140; *Empire Transportation Co. v. Wamsutta Oil Co.*, 63 id. 14; s. c., 3 Am. Rep. 515. And

we may observe, that the case of *Pennsylvania Railroad Co. v. Henderson*, above cited, was the case of a drover's pass and the contract stipulated for immunity in case of injury from negligence of its agents or otherwise.

In Ohio by numerous decisions the law is settled, that a railroad company cannot by special contract exempt itself from liability for losses occasioned by its negligence or that of its servants. See *Jones v. Voorhees*, 10 Ohio 145; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 id. 362; *Wilson v. Hamillon*, id. 722; *Welsh v. Pittsburgh and Fort Wayne Railroad*, 10 id. 75; *Cleveland Railroad Co. v. Curran*, 19 id. 1; s. c., 2 Am. Rep. 362; *Cincinnati Railroad Co. v. Pontius*, 19 Ohio St. 221; *Knowlton v. Erie Railway Co.*, id. 260; s. c., 2 Am. Rep. 395.

In the case of *Cleveland Railroad Co. v. Curran*, above cited, it was held in relation to a drover's pass similar to the one in this case, that the holder was not a gratuitous passenger, and that in such case a contract exempting a company for loss by reason of the negligence of the company's servants would be void as contrary to public policy. It approves of the Pennsylvania cases above cited on this subject.

The main difference between the Pennsylvania and Ohio decisions is, that the former give to a special contract not in violation of public policy the effect of converting the common carrier into a special bailee for hire, whose duties are governed by the contract; and if negligence is charged, it must be proved by the party injured; whilst the latter hold, that the character of the carrier is not changed by the contract; but he is still a common carrier, with enlarged exemptions from responsibility, within which the burden of proof is on him to show proper care and diligence, when an injury occurs. The effect of this difference is to shift the burden of proof from one party to the other. This diversity between the decisions of these two States is pointed out by Justice BRADLEY in the *Railroad Co. v. Lockwood*, 17 Wall. 370. Reason and justice are with the Ohio decisions on this point of diversity from the Pennsylvania cases.

In Maine it is held that a railroad company cannot by express contract exempt itself from responsibility for damages that may happen to cattle by their negligence, and that in such case it makes no difference, whether the negligence be ordinary or gross, such distinction in such case being untenable. See *Sayer v. Portsmouth etc., R. R. Co.*, 31 Me. 228, 238.

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The same views are held by the courts of Massachusetts. See *School District v. Boston, etc., Railroad Co.*, 102 Mass. 552, 556; s. c., 3 Am. Rep. 502. There are also numerous other cases in other States which are referred to in *Railroad Co. v. Lockwood*, 17 Wall. 571, which are to the same purport. They are: *Indianapolis Railroad v. Allen*, 31 Ind. 394; *Michigan Southern Railroad v. Heaton*, id. 397, note; *Flinn v. Philadelphia, Wilmington & Baltimore Railroad*, 1 Houst. 472; *Orndorff v. Adams Express Co.*, 3 Bush, 194; *Swindler v. Hilliard & Brooks*, 2 Rich. 286; *Berry v. Cooper*, 28 Ga. 543; *Steele v. Townsend*, 37 Ala. 247; *Southern Express Co. v. Crook*, 44 id. 468; s. c., 4 Am. Rep. 140; *Whitesides v. Thurlkill*, 12 S. & M. 599; *Southern Express Co. v. Moon*, 39 Miss. 822; *New Orleans Mutual Ins. Co. v. Railroad Co.*, 20 La. Ann. 302.

The Supreme Court of the United States, too, while holding that a common carrier for hire may exempt itself from certain common-law liabilities by a special contract, holds that it cannot exempt itself from responsibilities for any loss occasioned by any degree of negligence on its part or on the part of its servants. See *New Jersey Steam Navigation Company v. Merchants' Bank*, 6 How. 383; *Philadelphia & Reading Railroad Co. v. Derby*, 14 id. 486; *Steamboat New World v. King*, 16 id. 469; *York Company v. Central Railroad*, 3 Wall. 107; *Waller v. Transportation Company*, id. 150; *Express Company v. Kountz Bros.*, 8 id. 342; *Railroad Company v. Lockwood*, 17 id. 357. And in such a case there is no distinction between negligence and gross negligence as laid down in the last case cited.

Precisely the same position is held by the Court of Appeals of Virginia. See *Virginia and Tennessee Railroad Company v. Sayres*, 26 Grat. 328. This was a case in which there was a special contract for the transportation of cattle in consideration of reduced charges and a free pass to the shipper.

These authorities sustain the position that common carriers for hire by special contract, based on a valuable consideration, may exempt themselves from losses or damages resulting from inevitable accident, though such accident was not the result of the act of God or of the public enemy, provided the negligence of the common carrier or its servants in no manner contributed to such accident; but a common carrier for hire by special contract, though based on a valuable consideration, cannot exempt itself from loss

or damage which has in any degree been caused by his own negligence or that of his servants. This position is in consonance with the old decisions in England and New York ; but the latter part of this proposition is opposed by the English decisions between 1832 and 1854 and by the recent New York cases; and this portion of the proposition is not sustained by a few scattering decisions in some of the States before referred to, and which, while not in direct opposition to it, may be regarded as to some extent conflicting therewith. The proposition is however fully sustained by the decisions in Pennsylvania, Ohio, Maine, Massachusetts, Indiana, Kentucky, South Carolina, Georgia, Alabama, Mississippi, Louisiana and Virginia, and also by the Supreme Court of the United States; and as controlled by this proposition, is the case of a drover travelling on a free pass to take care of cattle being transported for compensation. The railroad company being in such case considered as a common carrier for hire.

This proposition is in opposition to New York decisions; but the law was settled in New York by a divided court and in opposition to a decision of the Supreme Court of that State, and not in consonance with a previous decision of the Court of Appeals of that State. But on the other hand this proposition is held to be true by the Supreme Courts in Ohio, Pennsylvania and Virginia, and by the Supreme Court of the United States.

I have reviewed the authorities at some length, because there is a decision of the Supreme Court of Appeals of the State of West Virginia, which is in conflict with the views I have expressed and with the great weight of authority. In the case of the *Baltimore & Ohio Railroad Co. v. Rathbone*, 1 W. Va. 87, the court decides: "That it is competent for a common carrier to diminish and restrict his common-law liabilities by special contract; and that he may by express stipulations, absolve himself from all liability resulting from any and every degree of negligence however gross, if it falls short of misfeasance or fraud, provided that the terms and language of the contract are so clear and definite as to leave no doubt that such was the understanding and intent of the parties."

This case was decided during the war. It was argued at some length, and no doubt all the authorities then accessible were examined by the counsel and court; yet few authorities were then accessible. The authorities referred to on this point by counsel were only the English and New York cases and the decisions of the Su-

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preme Court of the United States up to that time. The court in its opinion cites but a single case. We have seen that the recent New York and English cases are in conflict with the great weight of authority. A decision of such importance, rendered by a court under such disadvantageous circumstances, and in conflict with both reason and the great weight of authority, though it be our own court, we cannot follow.

The court in that case also drew a distinction between ordinary and gross negligence. In speaking of this distinction the Supreme Court of the United States in *Railroad Co. v. Lockwood*, 17 Wall. 382, 383, say: "We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence, which is due from a party, and which he fails to perform, than the amount of inattention, carelessness or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross carelessness. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence.

"In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply negligence. And this seems to be the tendency of modern authorities (citing 1 Smith's Lead. Cas. (7 Am. ed.) 453; Story on Bailments, § 571; *Wyld v. Pickford*, 8 M. & W. 460; *Hinton v. Dibbin*, 2 Q. B. 66; *Wilson v. Brett*, 11 M. & W. 113; *Beal v. South Devon Railway Co.*, 3 H. & C. 337; *Grill v. Iron Screw Collier Co.*, L. R., 1 C. P. 600; *Philadelphia & Reading Railroad Co. v. Derby*, 14 How. 486; *Steamboat New World v. King*, 16 id. 274)," to which I will add, *Virginia & Tennessee Railroad Co. v. Sayers*, 26 Gratt. 348. The Supreme Court adds: "If these cases seek to abolish the distinction of degrees of care, skill and diligence required in the performance of various duties and the fulfillment of various contracts, they go too far, since the requirement of different situations is too firmly settled and fixed in the law to be ignored or changed."

The decided preponderance of authority is to hold a public carrier bound, whenever it is shown, that the loss or damage is occa-

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sioned by any negligence, whether gross, ordinary or slight, as shown by the above authorities.

The Court of Appeals of West Virginia has heretofore shown that it doubted the position laid down in *Baltimore & Ohio Railroad v. Rathbone*, 1 W. Va. 87, when it laid down the law with much more caution in the *Baltimore & Ohio Railroad v. Skeels*, 3 W. Va. 559. The language of Judge BERKSHIRE there is: "The authorities, so far as I have been able to extend my examination, are uniform to this point, and it seems well agreed, that by express stipulation in the contract to that effect, they may at least exonerate themselves from all liability that does not arise from the want of ordinary care and diligence on their part."

[Omitting other matters.]

Judgment reversed.

All concur.

 TRUSTEES OF BROOKE ACADEMY V. GEORGE.

(14 W. Va. 411.)

Constitutional law — legislative diversion of bequests.

A testator bequeathed the residuum of his estate to the Virginia Literary Fund, a corporation composed only of officers of the State. Subsequently to his death the legislature by enactment appropriated the fund to the Brooke academy, an incorporated private educational institution. *Held*, unconstitutional.

BILL against an executor for accounting, etc. The opinion states the point sufficiently. The defendant had judgment below.

R. G. Barr, for appellants.

G. W. Caldwell, for appellees.

GREEN, President. The views I entertain of this case render it unnecessary for me to express any opinion in reference to any of the twenty causes of demurrer assigned by the defendants, except the second of these causes, "that the act of the Virginia legislature of December 20, 1862, is unconstitutional, null and void." And

except so far as the decision of this point may involve an expression of opinion necessary on some other causes of demurrer alleged, it would be improper to express any opinion, as the expression of such opinion is unnecessary, and as the "Board of the Literary Fund" or its successor, and the heirs and distributees of Peter Curran, the parties really interested in these questions, are not before this court.

It is argued by the appellant's counsel that the seventeenth clause of Peter Curran's will, which is in these words: "I bequeath to the Virginia Literary Fund all the residue of my estate of whatever kind, after paying all the foregoing bequests," is a bequest to "The Board of the Literary Fund;" that this corporation was composed only of officers of the State; that it was simply an agency of the State, and therefore a bequest to it was a bequest to the State; that this bequest, by virtue of the second, third and eighth sections of chapter 80 of the Code of Virginia of 1860, page 419, was valid; and as the donor or testator prescribed no uses to be made of this bequest, he thereby left it to the discretion of the legislature to dispose of it in any manner in which it could dispose of any other funds in the State treasury; and that the disposition made by the legislature thereof by the act of December 20, 1862, which was a gift of it to the Brooke Academy, was such a disposition as the State could have made of other funds in the treasury, and it was therefore operative and valid.

This argument admits, that if the legislature had no power or right to appropriate any funds in the treasury to the plaintiff, the trustees of the Brooke Academy, that they have no claim to the residuary fund of Peter Curran's estate. For according to this view, the right of the legislature to make this appropriation is the same as that to appropriate in like manner a fund in the treasury of the State raised by taxation.

We propose then to consider the question whether the legislature of Virginia had a right to appropriate to the trustees of the Brooke Academy any fund in the treasury, which had been raised by taxation of the people of the State; for if they had not, then upon the grounds assumed by the plaintiffs' counsel they can have no legal claims to the residue of Peter Curran's estate.

It is true, that in creating a legislative department and conferring on it legislative power the people of Virginia must be understood to have conferred full and complete legislative power, to the extent

that such power may be exercised by the governing power of any country, subject only to such restrictions as they saw fit to impose by their Constitution and such as are contained in the Constitution of the United States. And this being the case, a court cannot declare a statute unconstitutional and void solely on the grounds of its unjust and oppressive provisions, or because it is supposed to violate the natural, social or political rights of the citizen not guaranteed by the Constitution itself. Nor can they declare an act unconstitutional and void, because it appears to the minds of the judges to violate the fundamental principles of a republican government, not forbidden by the Constitution itself to be violated. For a court cannot legitimately substitute its own judgment for that of the legislature in any case properly within its power under the Constitution; and if it could set aside an act simply because the court believed it unjust or oppressive or in violation of the natural, social or political rights of citizens, or contrary to the fundamental principles of republican government, it would be impossible to set a limit to its authority, and its discretion alone would become the measure of the extent of its interference, a discretion, which would vary with the peculiar notions of each individual judge. A statute, therefore, before it can be declared void by the courts, must be clearly in violation of some provision of the Constitution of the State or of the United States.

But if a legislature passes an act, which is not properly a statute, because not legislative in its character, such an act must be declared void by courts, because the Constitution has conferred on the legislature only legislative power. No court for instance would hesitate to declare void an act, which enacted that A. and B., who were husband and wife to each other, should be so no longer, but A. should thereafter be the husband of C. and B. the wife of D., or which should enact that the homestead now owned by A. should be no longer his, but should henceforth be the property of B. See *Loan Association v. Topeka*, 20 Wall. 663. These would be despotic acts not legislative in their character; and therefore the power to pass such acts is not conferred by the Constitution on the legislature. So an act of the legislature donating the property of the State to an individual, or a private corporation, in disregard of the public interest, is not legislative in its character, and should therefore be declared void by the courts. And so if the legislature, instead of itself making such a donation, was to authorize a muni-

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cipal corporation to make such a donation of the property of the municipality, such act would be equally void; and if it authorized a municipal corporation to levy a tax for the purpose of raising a fund to make such a donation, it would be equally clear that such act would be void.

Thus it has been held, that the legislature cannot authorize a town to pay bounties to persons, who have heretofore enlisted in the military service of the United States, or to pay the commutation required of individuals who have been drafted into such service, or to pay select men for costs and damages sustained by their resisting prosecutions brought against them for refusing to erase names from a check list of the voters for State and United States officers. See *Crowell v. Hopkinton*, 45 N. H. 9; *Freeland v. Hasting*, 10 Allen, 570; *Moulton v. Inhabitants of Raymond*, 60 Me. 121; *Gove v. Epping*, 41 N. H. 539.

But it has been decided, that it is competent for the legislature to authorize municipal corporations to raise money by taxation to pay bounties to volunteers, who may enlist in the military service of the United States, when by the law such volunteers are to be credited the quota of such town. See *Brodhead v. City of Milwaukee*, 19 Wis. 658; *Booth v. Woodbury*, 32 Conn. 128; *Speer v. Blairsville*, 50 Penn. St. 150.

These cases may be perhaps sustained, on the ground that the taxation authorized was not in order to raise money for a mere *private* purpose. It is admitted that the legislature cannot authorize a tax to be levied for any mere *private* purpose. But it is contended, that such bounties are not mere private donations in disregard of the public interest; but that they are made to relieve the town from a heavy public burden of furnishing its quota of persons for military service; and that the interest of every inhabitant of such town is promoted by the giving of such bounties, as thereby every inhabitant is relieved from the risk of being compelled to render military service by the lot falling on him; and thus this bounty is not a mere gift but is money paid for a valuable consideration, and is therefore a contribution from the public treasury for a general good.

It is true the judges, who delivered the opinion of the court in these cases, do not base those decisions on this ground only, but lay down principles, which would justify such donations in cases in which the public good was not thus promoted. But much of their

reasoning is not, as we shall see, sustained by the authorities ; nor has it been followed in other cases by themselves always. The strong approbation felt by these judges and by the community generally for such particular laws may have induced the judges to sustain them not only by showing them to be consistent with what are perhaps sound principles, but to go further and to sustain them by unsound reasoning and laying down principles of law, which cannot be sustained and have not been followed in other cases.

It is obvious, that a mere donation to a private corporation, whether made by the legislature directly or by a municipal corporation by the authority of the legislature, must be regarded precisely as would a donation to a private individual. In either case the act of the legislature must be held to be void, as not legislative in its character. Thus it has been held, that the legislature cannot authorize a town to either donate public funds of the town or lend its credit to private persons or corporations in consideration of their establishing a manufactory in the town. See *Allen v. Inhabitants of Jay* ; *Loan Association v. Topeka*, 20 Wall. 665. This last case was cited approvingly in the case of *Ohio Valley Iron Works v. Town of Moundsville*, 11 W. Va. 1.

The Supreme Court of the United States in *Loan Association v. Topeka*, say: " We have established beyond cavil there can be no lawful tax, which is not laid for a *public purpose*. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense, and what is not. It is undoubtedly the duty of the legislature, which imposes or authorizes a municipality to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use ; and the courts can only be justified in interposing, when a violation of this principle is clear and the reason for their interference cogent. But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not a public purpose. If it be said, that a benefit results to the local public of a town by establishing manufactories, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owners are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer, which would not open the coffers of the public treasury to the im-

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portunities of two-thirds of the business men of the city or town." Shortly after the disastrous fire in Boston a statute was passed authorizing the city to issue its bonds to an amount not exceeding \$20,000,000,00, which bonds were to be loaned under proper guards to the owners of the grounds, whose buildings had been destroyed, to aid them in rebuilding. Though it was obvious, that great benefit might in this indirect manner result to the city of Boston in the speedy rebuilding of the burnt district, yet the Supreme Court of Massachusetts held this act of the legislature null and void. See *Lowell v. City of Boston*, 111 Mass. 454 ; s. c., 15 Am. Rep. 39.

It is true that a decided preponderance of authority is to be found in favor of the authority of the legislatures of the States to confer upon municipal corporations the right to subscribe to the stock of railroad companies or to lend them their credit. But able jurists have held, and still hold, that the legislatures have no power to confer such authority.

The cases on this subject are very numerous ; but the views of those opposed to the validity of acts of the legislature conferring such authority are well presented in the cases of *Whiting v. Sheboygan and Fond du Lac Railroad Co.*, 25 Wis. 167, and *Hanson v. Vernon*, 27 Iowa, 28 ; and the views of those, who sustain the validity of these laws, are strongly stated in *Sharpless v. Mayor, etc.*, 21 Penn. St. 147.

The Supreme Court of the United States, in *Loan Association v. Topoka*, 20 Wall. 661, in commenting on these decisions say: "In all these cases however the decision has turned upon the question whether the taxation, by which this aid was to be afforded to the building of railroads was for a *public* purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversies this has been the turning point of the judgment of the courts. And it is safe to say, that no court has held debts created in aid of railroad companies by counties or towns valid, on any other ground than that the purpose, for which the taxes were levied, was a public use, a purpose or object which it was the right and duty of the State governments to assist by moneys raised from the people by taxation.

"The argument in opposition to this power has been, that railroads built by corporations organized mainly for purposes of gain, the roads which when built being under their control and not that

of the State, were private and not public roads; and the tax assessed on the people went to swell the profits of individuals, and not to the good of the State, or the benefit of the public, except in a remote and collateral way.

"On the other hand it was said, that roads, canals, bridges, navigable streams and other highways had in all times been matters of public concern; that such channels of trade and of the carrying business had always been established, improved, regulated by the State; and that the railroad had not lost this character because constructed by individual enterprise aggregated into a corporation.

"We are not prepared to say, that the latter view is not the true one, especially as there are other characteristics of a public nature conferred on these corporations, such as the power to obtain the right of way, their subjection to the laws which govern common carriers, and the like, which seem to justify the proposition. Of the disastrous consequences which have followed its recognition by the courts, and which were predicted when first established, there can be no doubt."

For these reasons I concur in the view, that unless restricted by some special provisions of its Constitution, a State legislature under the general grant of legislative power could furnish aid to a railroad company; for in so doing the taxation necessary to give such aid is laid for a public purpose. The Constitution of our State evidently takes this view of railroads, for they are by section 9, article III of our Constitution declared public highways. The acts of 1872-3, p. 37. But there are provisions in our Constitution not necessary to be now pointed out, which affect the question of aid that may be furnished railroad companies. I concur therefore in the conclusion reached by the Supreme Court of Pennsylvania in the case of *Sharpless v. Mayor of Philadelphia*, 21 Penn. St. 147, that an act of the legislature authorizing a subscription of a city to the stock of a railroad corporation is constitutional and valid, under the grant of general legislative power in a State Constitution; but with a portion of the reasoning of the court in that case I cannot concur, it being in opposition to the authorities I have cited, and the views I have expressed.

It seems to me clear, that a donation by a legislature, or by a municipal corporation by its authority, to a private school, whether unincorporated or incorporated, cannot be brought within the principles which would justify such donation in aid of a railroad com-

pany. Such a donation on the contrary comes clearly within the reason which forbids such donation to a manufactory, whether unincorporated or incorporated. It was so expressly decided in the case of *Curtis v. Whipple*, 24 Wis. 350.

By an act of the legislature of Wisconsin the town of Jefferson was authorized to raise by tax \$5,000 to aid in the erection of buildings for the "Jefferson Liberal Institute" in said town. This law was pronounced void by the Supreme Court of that State, because it was not legislative in its character.

DIXON, C. J., in delivering the opinion of the court, says: "The counsel for the plaintiff correctly state the effect of the act of incorporation (Pr. & Local Laws of 1866, ch. 516), when they say the 'Jefferson Liberal Institute,' for the benefit of which the taxes in question were attempted to be assessed and collected, is essentially a private educational institution, controlled exclusively by the stockholders through a board of trustees. The town of Jefferson is not a stockholder and has no voice in its management. The tax payers in the town, as such, are not stockholders, and have no privileges in the school that are not common to all the people of this or any other State. The trustees may exclude any or all the citizens of the town from the institution. The money when collected is to be paid to the treasurer of the institution; and the town is not secured the right to see or know, that it is expended for the purposes for which it was collected. Under these circumstances we feel no doubt, that the act under which the proceedings to levy are justified, is unconstitutional and void.

"It strikes us 'at the first blush,' that this is not the collection of money for public purposes, as clearly as if the institute were not an incorporated body, but a mere association of private individuals resolved upon the establishment of a like institution.

"If it were such an institution, or a grammar or classical school or a seminary built up and established by individual enterprise, as by persons engaged in the profession of teaching, or by others, and owned and controlled by others contributing toward it, and the emoluments belonging to them, we apprehend that no one would contend that the people of Jefferson might be taxed for the purpose of donating the money to it. The fact that it is an institution incorporated by the act of the legislature does not change its character in this respect.

"It is but a most frivolous pretext for giving to a corporation,

when there is no certain and definite responsibility, money exacted from the tax-payers, which a just and honorable man engaged in the same business would hesitate to receive though paid without opposition, and to enforce the payment of which he would never think of resorting to coercive measures, provided the same were lawful.

"It can no more be supported by taxation than if it were unincorporated, or a private school or seminary of the kind above supposed. Nor will the location of the institution at Jefferson, and the incidental benefits which may arise to the people of the town, sustain the tax. That is not the kind of public benefit and interest which will authorize a resort to the power of taxation. Such benefits accrue to the people of all communities from the exercise in their midst of any useful trade or employment, and the argument, pursued to its logical result, would prove that compulsory payment or taxation might be made use of for the purpose of building up and sustaining every such trade or employment, though carried on by private persons for private ends, or the purposes of mere individual gain and emolument.

"That there exists in the State no power to tax for such purposes is a proposition too plain to admit of controversy. Such a power would be obviously incompatible with the rights and institutions of a free people, and the practice of all liberal governments, as well as all judicial authority, is against it. If we turn to the cases where taxation has been sustained as in pursuance of this power, we shall find in every one of them that there was some direct advantage accruing to the public from the outlay, either by its being the owner or part owner of the property or thing to be created or obtained with the money, or the party immediately interested in and benefited by the work, the same being matters of public concern; or because the proceeds of the tax were to be expended in defraying the legitimate expenses of the government, and in promoting the peace, good order and welfare of society. Any direct public benefit or interest of this nature, no matter how slight, as distinguished from those public benefits or interests, incidentally arising from the employment or business of private individuals or corporations, will undoubtedly sustain a tax."

In so much of the opinion of Chief Justice DIXON as I have quoted above I fully concur, and it seems to me in entire accord with the authorities I have cited; but I submit that it is difficult

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to reconcile them with the views and reasoning in the case of *Brodhead v. City of Milwaukee*, 19 Wis. 624.

Chief Justice DIXON there says: "Counsel on both sides accept as correct the principles as laid down in the great leading case of *Sharpless v. Mayor of Philadelphia*, 21 Penn. St. 147, upon the subject of taxation. The same principles have frequently been affirmed by this court. The legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. It cannot in the form of a tax take the money of the citizens and give it to an individual, the public interest and welfare being in no way connected with the transaction. The object for which money is raised by taxation must be public, and such as to subserve the common interest and well being of the community required to contribute. *To justify the court in arresting the proceedings and declaring the tax void, the absence of all possible public interest must be clear and palpable. So clear and palpable as to be perceptible by every mind at the first blush.* In addition to these, I understand that it is not denied that claims founded in equity and justice in the largest sense of the terms, or in gratitude or charity, will support a tax. Such is the language of the authorities."

If we give to this language, and especially that portion I have italicised, the ordinary signification of such language, it would be difficult to conceive a case where the courts would not hold a legislative donation of public funds valid. For it can hardly be imagined that a legislature would donate public funds, where it was apparent at the first blush to everybody that in making the donation they could not have been actuated either by motives of charity, or equity and justice in its largest sense, or by a feeling of gratitude, or by some *possible* benefit to the public either direct or indirect. It seems to me, however selfish or corrupt such a donation by the legislature of public funds might be, some mind could nevertheless conceive, that the legislature was actuated by some of the above motives, or that some possible indirect benefit might accrue to the public. In fact the possession of funds by any person is itself of some indirect advantage to the community, in which he lives; and if so, this would itself suffice to require of the courts to hold, that any legislative donation of funds to a resident of the State was valid, if these views were correct. Language equally strong with that above was used in the case of *Wood v. Town of Woodbury*, 32

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Conn. 128; but it is unsustained by the weight of the authorities, as the cases I have cited plainly show.

PAINÉ, J., in his dissenting opinion in the case of *Curtis, Adm'r, v. Whipple*, points out the inconsistency in Chief Justice DIXON's views as above stated. After quoting that portion of his former opinion, which I have italicised, he says: "If such language were to be applied without qualification, it would most certainly sustain the tax in this case, and also in many other cases, in which in the opinion of the chief justice it is claimed to be very clear that a tax could not be sustained."

It remains to apply the law as above stated to the case before us. The charter of the Brooke Academy, as set forth in the statement of this case, shows clearly, that it is a private educational institution controlled exclusively by its board of trustees. The State of Virginia was not a stockholder in the corporation and had no voice in the management. The tax payers of the State, as such, were not stockholders; and the citizens of the State of Virginia had no privileges in the Brooke Academy that were not common to the people of Ohio and Pennsylvania or those of any other State. The trustees of the Brooke Academy might exclude any and all citizens of Virginia from having any control of the institution or from even sending their children to the academy. The trustees of the Brooke Academy by this act of the 20th of December, 1862, are to recover the whole of this large residuary fund of Peter Curran's estate, which was, they say, the property of the State; but the State of Virginia is in no manner secured the right to see or know that it is expended for educational purposes at all. There is no legal obligation on the trustees of Brooke Academy to have a school taught at all. The very act which makes to them this large donation of funds, claimed by them to have belonged to the State, expressly provides, that they may sell all their real estate, and that the signature of their president alone to a deed may convey away all their real estate. This provision would seem to have been intended to make clear the right of the trustees to control every thing connected with their business in any manner they chose. This right they always had; but in providing that they might sell all their real estate, the attention of the legislature was called to the fact, that the trustees of the Brooke Academy were under no obligation to have an academy kept at all. The legislature had just as much right to give this \$30,000 or \$40,000 claimed by the

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appellant to belong to the State to any individual teacher in the State without even requiring him to keep a school, as to make this donation to the trustees of Brooke Academy. It was not an act legislative in its character; and the power to pass such act was therefore never conferred on the legislature. This donation was made for no public purpose, but for one which was merely private. We have no doubt that the 1st and 2d section of the act of the legislature passed December 20, 1862, entitled "An act to appropriate the residuary fund under the last will and testament of Peter Curran, deceased, to Brooke Academy" is unconstitutional and void.

The decree of the Circuit Court, which we are reviewing, while it decides the only principle necessary to be decided in order to dispose of the causes, makes no order in reference to the payment of the costs in the suit; and therefore this cause must be remanded to the Circuit Court.

The decree of the Circuit Court of February 9, 1878, must therefore be approved and affirmed; the appellees must recover of the appellants their costs expended in this court and \$30.00 damages; and this cause must be remanded to the Circuit Court of Brooke county to be further proceeded with according to the rules and principles governing courts of equity.

Decree affirmed. Cause remanded.

The other judges concurred.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

STACHE V. ST. PAUL FIRE AND MARINE INSURANCE COMPANY

(40 Wis. 82.)

Insurance — fire — compromise after loss.

The agreement by a fire insurance company, to pay a certain sum in compromise of a claim for loss, when made after an opportunity to investigate, and without fraud or deception on the part of the insured, cannot be defeated by proof of a subsequently discovered breach of warranty of the policy. (*See note, p. 775.*)

ACTION on a policy of fire insurance. Defense, breach of warranty. The evidence showed that after the fire the adjuster of losses for the defendant, for the purpose of investigating and adjusting the loss, visited the location of the insured property and adjusted the loss with the plaintiffs. After visiting the locality of the insured property, he stated to the local agent of the company that he thought it was a fraud; but notwithstanding this he then made an agreement with the plaintiffs that the loss should be adjusted at \$1,306.92, to be paid in sixty days; and although the plaintiffs claimed the loss to be greater, they agreed to take that sum in full and surrender the policy on payment of the same. The defendant had judgment below.

Stache v. St. Paul Fire and Marine Insurance Company.

J. C. & A. C. Neville, for appellants.

Hastings & Greene, for respondent.

TAYLOR, J. [Omitting other questions.] Upon the facts found it is settled that after the loss occurred, and after the authorized adjuster of the defendant had investigated the loss, an agreement was entered into by the defendant and the plaintiffs, that the defendant should and would pay the assured the sum of \$1,306.92 at the end of sixty days, and the plaintiffs would accept such sum in full payment and satisfaction of such loss. The findings also show that the plaintiffs claimed that the loss exceeded the sum agreed to be paid, and that the final agreement to pay such sum of \$1,306.92 was an amicable compromise of the differences between the parties. It is not claimed by the learned counsel for the respondents, that this agreement to pay the \$1,306.92 is not binding upon the defendant, in the absence of any mistake or fraud in the settlement; but it is alleged that the defendant may avoid it upon two grounds. First, that the findings show that there was a breach of warranty of one of the conditions of the policy, in this, that the insured had falsely represented that he was the owner in fee of the lands upon which the insured buildings stood, when in fact he had only a leasehold interest in such lands, and that such breach of warranty was not known to the defendant company at the time the agreement to compromise and pay the said sum of \$1,306.92 was entered into; second, that the insured made false statements in his proofs of loss for the purpose of inducing the defendant to compromise and pay the claim, or some part of it, and that such false statements did induce the defendant to make the agreement to pay the said sum of \$1,306.92.

Upon the first point we think the authorities are clear that the company cannot avail itself of any breach of warranty in the policy to defeat a recovery upon an agreement to pay the loss, made after the loss has occurred, and after the company has had an opportunity to investigate the facts and circumstances affecting the fairness of the loss, without any interference, deception or fraud practiced by the insured at the time of such investigation; and that this is especially so when the agreement is a compromise of the claim at a less amount than the insured claims as his true loss. This position is fully sustained by the following authorities, cited by the learned

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counsel for the plaintiffs. *Smith v. Glens Falls Ins. Co.*, 62 N. Y. 85; *National Life Ins. Co. v. Minch*, 53 id. 144; *Lapeyre v. Thompson*, 7 La. Ann. 218; *Metropolitan Ins. Co. v. Harper*, U. S. Circ. C., W. D. Va., 5 Rep. 490; *Ins. Co. v. Chestnut*, 50 Ill. 111. The following authorities hold the same doctrine, *Ins. Co. v. Wager*, 27 Barb. 354; *Bilbie v. Lumley*, 2 East, 469; Ang. on Ins., § 409; May on Ins., § 575.

The case of *Smith v. Ins. Co.*, 62 N. Y. 85, was a case similar in all respects to the case at bar, and Chief Justice CHURCH, who delivered the unanimous opinion of the court, in passing upon the question as to how far the company waives a breach of warranty contained in the policy by an agreement to pay a specified sum after the loss occurs, says: "The settlement and contract to pay a specified sum operates as a waiver of any warranty in the policy, unless the settlement and contract were procured by the fraud of the assured; and this is not found, and scarcely claimed. It is said that the company did not know of the breach of the warranty at the time of the settlement. The answer is, that when the claim was made for the loss the company was required to ascertain the facts as to any breach of warranty. If it saw fit to pay the claim, or compromise it, or to make a new contract without such examination, it must be deemed to have waived it, and in the absence of fraud it cannot afterward avail itself of such breach. It cannot urge payment or settlement by mistake on account of want of knowledge of such breach. The time for investigation as to breaches of warranty is when a claim is made of payment; and if the company elects to pay the claim, or what is equivalent, to adjust it by an independent contract, it cannot afterward, in the absence of fraud, retract or fall back upon an alleged breach of warranty."

Without attempting to enlarge upon or add to the argument of the learned chief justice, above quoted, we content ourselves with the statement that we approve the doctrine of that opinion. It is evident that the public good is promoted by the settlement and compromise, by the parties themselves, of their differences, without resort to litigation; and when such settlements are entered into without fraud practiced by either party to bring about such settlement, all questions as to the legal obligation of the party promising to pay by the terms of such settlement, growing out of the terms and conditions of the original contract upon which the one party

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bases his claim and the other party disputes it, must be considered waived by the new agreement adjusting and compromising such claim.

[Omitting other questions.]

The judgment of the Circuit Court is reversed, and the cause remanded with directions to the Circuit Court to render judgment upon the verdict for the plaintiffs, for the sum of \$1,306.92, with interest thereon from the 23d day of August, 1877.

Reversed and remanded.

NOTE BY THE REPORTER.—In *F. & M. Ins. Co. v. Chestnut*, 50 Ill. 111, there was an omission in the application to mention a wooden building in close proximity to the insured premises, but after loss the company promised to pay a portion of the loss, having knowledge of the facts at the time. The court said: "If the new promise was made upon a sufficient consideration, and with full knowledge of all the facts, it was sufficient of itself to fix their liability." "The case then is narrowed down to the validity of the new promise which the jury found was made. It was not a nude fact, because Wigle claimed that his policy covered certain boots, shoes, and claiming that they were destroyed by the fire. This was denied by the company. The question was not free from doubt, but Wigle, for the sake of a settlement, agreed to forego this claim, and accept the amount the company was willing to pay. This appears both by his own testimony and that of the president and upon the familiar principle applicable to the compromise of disputed claims, was binding upon the parties as a mutual settlement, so far as depended upon the question of consideration. After signing the statement of loss at the amount agreed upon, without fraud, Wigle could not have recovered a larger sum, and his agreement to take that sum was a sufficient consideration for the promise of the company to pay it."

In *Dow v. Smith*, 1 Cal. 32, it was said, that "an adjustment cannot be opened except upon the ground either of fraud or mistake from facts not known."

In *Mutual Life Ins. Co. v. Wager*, 27 Barb. 387, the court said: "A distinction must be taken between the misrepresentation or ignorance of a fact attending the loss upon which the money was paid and the contract executed, and the misrepresentation or ignorance of an original fact which induced to the making of the contract. The contract of insurance is an executory contract, executed by the payment of the sum insured on a loss. If there was fraud in the original contract, not known when the loss was paid; or if the loss was paid in ignorance of some circumstances attending the loss, which if known would have enabled the insurers to resist the claim, the money may be recovered back; but if they knew, when they paid the loss, or upon inquiry might have informed themselves of the grounds upon which they might have resisted the claim, they cannot afterward recover it back; for it would open the door to infinite litigation." *Bible v. Lumley*, 2 East, 469; Ang. on Ins., § 409. Ignorance of a fact which if known would have prevented the execution of an executory contract, and ignorance of a fact which if known would have prevented its being carried into effect, are very different things. The law does not intend to extend to a party more than one opportunity fairly to litigate his rights. If he intends to plead ignorance merely of a fact, which if known would have prevented his making the contract originally, he must do it when called upon to carry the contract into effect, if upon inquiry he could have informed himself of the fact. To permit him, after its full execution by the payment of money, to recover back the money on the ground of ignorance merely of such fact, would in effect be to permit him to try the same question twice on the same evidence; or to repent and revoke a voluntary act. The payment, with the knowledge, or with the means of knowledge, of such fact, must be deemed a voluntary payment, and the party to be estopped from alleging ignorance of such fact."

Mutch v. Pierce.

But a mere adjustment, without compromise or payment, will not amount to an estoppel.

In *Herbert v. Champion*, 1 Camp. 124, Lord ELLENBOROUGH made a distinction between cases where the loss had been paid, and cases where there was only an adjustment. "If the money has been paid, it cannot be recovered back without proof of fraud; but a promise to pay will not in general be binding unless founded on a previous liability. What is an adjustment? An admission, on the supposition of the truth of certain facts stated, that the assured are entitled to recover on the policy." Here it was a mere admission, and there was no consideration for the promise it is supposed to prove." To the same effect, *Shepherd v. Chewter*, id. 274. But these cases differ from a case of compromise, which furnishes a consideration. So after adjustment, if the assured had omitted an article, he would not be concluded. *Elliott v. Roy. Ex. Ass. Co.*, L. R., 2 Exch. 240.

In *Whipple v. North British, etc., Ins. Co.*, 11 R. I. 139, there was an "adjustment subject to terms and conditions of several policies." The court said: "Ordinarily, without doubt, an adjustment of loss is equivalent to a promise to pay the loss so determined; for ordinarily an adjustment implies a liability for the loss and a consequent promise to pay it. But an adjustment does not necessarily imply liability, and accordingly it may be made under a reservation of the question of liability. This appears to have been done in the case at bar. The adjustment was made subject to the terms and conditions of the policy; and by the terms of the policy the company is relieved from liability in case certain conditions or stipulations are not fulfilled by the insured. The adjustment, in view of the qualifying words, means simply that 'the company would pay the amount agreed on if liable at all.'"

If, however, after the settlement, the insurers discover that there was fraud, misrepresentation, or concealment in the original contract, or circumstances transpire which would have justified their resisting the claim, but which they had no means of ascertaining at the time of payment, they may recover the money paid to the assured." *Wood on F. Ins.*, sec. 468.

MUTCHA v. PIERCE.

(40 Wis. 231.)

Evidence — res gesta — declarations.

In an action for a negligent injury to plaintiff's minor son by a pistol wound, the son's declaration, made after the wound was dressed, that the defendant was not to blame, is inadmissible as evidence in chief.*

ACTION for negligent personal injury to plaintiff's minor son. The opinion states the point. The defendant had judgment at the trial, which was reversed at circuit.

A. C. Fish, for appellant, contended that the evidence in dispute was admissible on two grounds: 1. As a part of the *res gesta*. 1 Greenl. Ev., § 108, and notes 1 and 2; *PARK, J.*, in *Rawson v. Haigh*, 2 Bing., 99; 1 Phillips on Ev. 205; 1 Starkie on Ev. 47;

*See *Hawker v. B. & O. R. R. Co.*, 15 W. Va. 628.

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Rex v. Smyth, 5 C. & P. 201; Stephen's Dig. Law of Ev. 44, note 2, and authorities there cited. 2. As an admission of a party not of record. 1 Greenl., § 180 and note 6, and authorities there cited. "In an action by a father for the loss of the life of the son, the declarations of the son after the injury as to the cause are admissible against the father." *Stearn v. R. R. Co.*, 7 Leg. Gaz.

John B. Winslow, for respondent.

TAYLOR, J. This action was commenced in a justice's court to recover damages which the plaintiff claims to have suffered by reason of an injury inflicted upon his minor son by the careless and negligent acts of the defendant. In the justice's court the defendant had judgment in his favor. The plaintiff appealed to the Circuit Court, and not having made the necessary affidavit to entitle him to a new trial in that court, the case was heard upon the return of the justice, and the Circuit Court reversed the judgment on the ground that the justice erred in permitting the defendant to put the following question to the witness, Adam Mutch a, the son of the plaintiff, and the person who had been injured: "What did you say to James Smith when you were in the buggy, ready to go home, in reply to his question as to who was to blame?" to which the witness answered, "Nothing; did not say any thing to him;" and in afterward permitting the defendant, as a witness on his own behalf, to answer the following question, against the plaintiff's objection: "What did Adam Mutch a say to James Smith when he was going home in the carriage?" *Answer.* "He did not say that I was to blame. James Smith asked him about it, and he said I was not to blame for it." James Smith, as a witness for the defendant, was also permitted to testify as to what the witness Mutch a said to him, as follows: "I asked him if it pained him any. He said it did not. I asked him if *William Pierce* was to blame, and he said no; that he gave *Mr. Pierce* the revolver to turn the cylinder; he wanted to shoot some hell-divers."

The injury to the son of the plaintiff was occasioned by the discharge of a revolver in the hands of the defendant, Pierce. The evidence shows, and it is undisputed, that the son of the plaintiff came to a stable where the defendant was, handed him a revolver, and asked him to turn the cylinder so he could shoot some birds in the river near by; that defendant took the revolver and turned the

cylinder; and that while he was turning the same it was discharged, and the ball struck the plaintiff's son, and injured him so that he was unable to perform his usual work for some weeks thereafter. The only questions in the case were the negligence of the defendant, and the contributory negligence of the plaintiff's son. It will be seen, by an examination of the record, that this evidence as to what the plaintiff's son said to the witness Smith, after the occurrence had passed, was not introduced for the purpose of contradicting the plaintiff's son, and thus to a certain extent impeaching his credibility, but as affirmative evidence of the fact that the defendant was not to blame for the accident; and unless the evidence was admissible as a part of the *res gestæ*, it should have been rejected, and the Circuit Court was right in reversing the judgment of the justice.

The evidence shows that the statement, if made at all by the witness Mutch, was made after the accident occurred, and after his wound had been attended to and dressed by a physician who had been called for that purpose, and after he had taken his seat in a buggy to be carried home. What the exact length of time was between the happening of the accident and the conversation sworn to by the witnesses does not appear. It is insisted by the learned counsel for the appellant, that the evidence was a part of the *res gestæ*, and he cites some cases which give considerable force to the argument. But we are of the opinion that this court has settled the question against the appellant, and it is immaterial, therefore, what rule may have been established by the courts of other States, or of the United States. In *Sorenson v. Dundas*, 42 Wis. 642, this court, in a very brief opinion, says: "Declarations are verbal parts of the *res gestæ* only when they are contemporaneous. The respondent's narrative, after the occurrence, belonged no more to the *res gestæ* than his evidence on the trial." If this evidence was admissible for the defendant, as being a part of the *res gestæ*, then it would be equally admissible for the plaintiff; and the result would be that if the young man who was injured, after his wounds had been dressed, had made a detailed narrative of all that took place at the time the accident occurred, such narrative might be given in evidence in favor of plaintiff, as proof of what, in fact, took place at the time of the occurrence. This would clearly be the narrative of the witness after the occurrence, and not admissible under the decision above cited.

Schultz v. City of Milwaukee.

The rule laid down in the case above cited was approved in *Prideaux v. Mineral Point*, 43 Wis. 513-522; s. c., 28 Am. Rep. 558, where it is said: "The *res gestæ* of this accident did not go with the team to the livery stable, but remained in the *locus in quo*, with the injured woman; and the declarations of the driver to the livery man were a subsequent narrative of the *res gestæ*, not admissible in chief, as offered, though admissible, upon proper foundation, to contradict the driver." In the case last cited, what was said by the driver of the carriage which had been turned over and thereby injured the plaintiff, immediately on his return to the stable after the accident, was rejected by the court as inadmissible as a part of the *res gestæ*.

These cases sufficiently show that the evidence given, and which was objected to by the plaintiff in the justice's court, should have been rejected; and the judgment was properly reversed by the Circuit Court upon the appeal to that court.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

SCHULTZ V. CITY OF MILWAUKEE.

(49 Wis. 254.)

Municipal corporation — streets — liability for injury by "coasting."

A city is not liable for an injury done to a person on a public street by a collision with others sliding down hill thereon without any actual license from the city, as for "insufficiency or want of repair;" nor is it liable for not suppressing such a practice, that being a police duty. (*See note, p. 781.*)

ACTION for personal injury sustained by the plaintiff while passing along a public street in Milwaukee, by being run over by persons sliding down hill in said street. The complaint alleged that boys and young persons connected two or more small sleds by long boards, and crowding in great numbers thereon slid rapidly down a hill covered with ice and snow, and ran against and injured the plaintiff. That this mode of sliding was constantly practiced on that street, to the knowledge of the defendant and its officers and servants. The plaintiff had judgment below on demurrer.

D. H. Johnson, city attorney, for appellant, argued: 1. That a municipal corporation is not liable for any failure, mistake, or even wrong, committed by its legislative department. *Dill. on Mun. Corp.*, § 39. 2. That such a corporation is not liable for any failure on the part of its police department. *Id.*, § 773. 3. That coasting or bobbing in a highway is not an obstruction or defect in the highway for which a city or town is liable under the statute. *Ray v. Manchester*, 46 N. H. 59; *Hutchinson v. Concord*, 41 Vt. 271.

Austin & Runkel, for respondent.

LYON, J. 1. The injury of which the plaintiff complains was not caused by the insufficiency or want of repairs of the street in which he was injured, and hence the action will not lie under section 1339, R. S., p. 415. If authorities are required to so plain a proposition, they may be found in the brief of the city attorney.

2. The complaint contains allegations sufficient to show a gross neglect of duty on the part of the city officials. The coasting or sliding down Poplar street in the manner and to the extent charged in the complaint was, while being indulged in, a grievous public nuisance, which the city authorities ought to have prevented or suppressed. But this duty is a public or police, rather than a corporate, duty, in the performance of which the corporation, as such, "has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community." It was held in *Hayes v. Oshkosh*, 33 Wis. 314; s. c., 14 Am. Rep. 760, that a municipal corporation is not liable for injuries caused by the failure of its officers and agents to perform such duties. In the opinion in that case, from which the above extract is taken, Chief Justice DIXON says that the question there presented "is settled by authority as fully and conclusively as any of a judicial nature can ever be said to have been." See, also, *Wallace v. Menasha*, 48 Wis. 79.

3. The learned counsel for the plaintiff say in their brief, that "the complaint in this action is not founded upon the theory that the common council of the defendant city neglected to exercise the restraining power given by the charter, or enforce its police regulations, but solely upon the principle expressed in *Little, Adm'r, v. City of Madison*, 42 Wis. 643;" s. c., 24 Am. Rep. 435.*

*See s. c., post. REP.

In *Little v. Madison*, we construed the complaint as alleging that the city of Madison expressly granted a license to one Carr to give a bear show in State street, which was alleged to be, and in fact is, one of the principal streets of the city. It was charged that the injury complained of was caused by such bear show, exhibited there pursuant to such license. On demurrer it was held that the complaint stated a cause of action against the city. Although reference is made in the opinion by Mr. Justice COLE, to the fact that it was alleged in the complaint that the agents of the city knowingly and carelessly allowed one of its principal streets to become obstructed by the exhibition, yet the precise ground of the judgment in that case is, that if a municipal corporation, in the attempted exercise of any power conferred upon it by law, as to license shows, amusements and the like, exceeds its authority, and licenses the placing of a public nuisance in a street, or the unlawful and dangerous use of a street for any purpose, and an injury results therefrom, without negligence on the part of the person injured, the municipality is liable to respond in damages for such injury. The case goes no further, and could not without violating well settled principles of law.

[Omitting a question of pleading.]

It results from the foregoing views that the demurrer to the complaint should have been sustained.

The order of the Circuit Court overruling the demurrer is reversed, and the cause remanded for further proceedings according to law.

Order reversed, and cause remanded.

NOTE BY THE REPORTER. — To same effect, *Cahell v. City of Boone*, 51 Iowa, 647; s. c., 38 Am. Rep. 154. In *Steele v. City of Boston*, 128 Mass. 583, it was held that a city is not liable either at common law or by statute, for an injury received by a person crossing the public common from a sled used in coasting down a path on such common, although the city authorities licensed such coasting and prepared the path therefor. The court said:

"There was no evidence offered that the foot paths on the common have ever been laid out as highways or townways. The city holds the common for the public benefit, and not for its emolument or as a source of revenue, and has constructed and kept in repair these paths, as a part of the common, for the comfort and recreation of the public, and not as a part of its system of highways or streets. It is not liable under the statute for any defect or want of repair in them. *Oliver v. Worcester*, 103 Mass. 489; s. c., 8 Am. Rep. 485; *Clark v. Walham*, recently decided.

"The plaintiff contends that if there is no statute liability, the city is liable 'as owner of the land, and the maker and repairer of the way upon which the plaintiff was invited to go.' If a private person owned a similar park to which he had given the public free access we are at a loss to see how he could be held liable for an accident like that of the plaintiff. Such person might, if he saw fit, set apart and fit for use one of the paths for the

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recreation of youth in coasting, and if any one should, as was the case with the plaintiff, choose to enter upon the path seeing that it was set apart for this purpose, he would do so at his own risk, and could not hold the owner responsible if he was injured by a passing sled. But even if a private owner would be liable, it does not follow that the city would be. It maintains the common solely for the benefit of the public. If there is any legal duty to keep the paths in a safe condition, it is solely a public duty, for a breach of which no action lies by an individual who is injured, unless the statutes give such action. *Clark v. Waltham, supra*, and cases cited. The city may legally set apart a portion of the common for the recreation of the young. The fact in this case that it did so, and that it used means to fit it for the purpose for which it was set apart, did not render it liable to the plaintiff for the injury which he sustained." The precise doctrine of the principal case was held by the same court in *Pierce v. New Bedford*, Oct. 1880.

In *Borough of Norristown v. Fitzpatrick*, 8 W. N. C. 459, A. was injured while crossing a street in a borough, by the firing of a cannon by a crowd of men. The jury found in a special verdict that the firing had been going on for some hours, without any special authorization from the borough authorities, and that a policeman standing by at the time did not interfere to stop it. The borough was specially directed by act of assembly to appoint policemen to preserve the public peace, remove nuisances, etc. In an action by A. to recover damages for said injuries, held, that the borough was not liable. The court said: "The difference between those cases in which cities, boroughs and townships have been held responsible for neglect, and the one in hand, is very wide; the maintenance and repair of highways, sewers, wharves, etc., belong to their immediate jurisdiction, and over them they alone have control, hence their responsibility. But the conservation of the peace is a great public duty, put by the Commonwealth into the hands of public officers—the judges, justices of the peace, and mayors, the governors, sheriffs, constables, and policemen; hence cities and boroughs can no more be charged with damages, resulting from their misconduct, than can counties, townships, or the State at large." The same is held as to misfeasance of public officers, in *Pollock's Admrs. v. Louisville*, 18 Bush, 221; s. c., 28 Am. Rep. 280, and cases referred to in latter report; also in *Grumbine v. Mayor*, 2 McArthur, 578; s. c., 29 Am. Rep. 638. Very similar to the principal case in the circumstances and holding was *Boylard v. Mayor*, 1 Sandf. 37.

In *Harmon v. City of Lynchburg*, 33 Gratt. 37, it was held that the city was not liable for the destruction of whiskey by the police, although done in apprehension of danger from the presence of a large number of fugitive soldiers and other riotous persons, and of the immediate occupation of the city by a hostile soldiery, and as a means of safety to the persons and property of the citizens. The court said: "As well might it be contended that the city would be liable for a wanton assault and battery committed by its police."

PARRY V. SPIKES.

(49 Wis. 384.)

Statute of frauds—guaranty—consideration.

An agreement indorsed on a note before negotiation to "guaranty the payment of the within note," and constituting a ground of credit to the maker, is void within the statute of frauds if it does not express the consideration.

ACTION on a guaranty of a promissory note. Before delivery of the note to the payee, and to give it additional credit, and in consideration of the sale and delivery of goods by the payee to

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the maker, defendants indorsed and signed said note on the back as follows: "We the undersigned jointly guaranty the payment of the within note." The defendants had judgment below on demurrer.

G. J. Cox, for appellant. The original consideration to the maker embraces the guarantors as well as the principal, where the guaranty is contemporary with the principal contract. 2 Dan. on Neg. Inst., § 1759; *Houghton v. Ely*, 26 Wis. 181; s. c., 7 Am. Rep. 52; *Gorman v. Ketchum*, 33 Wis. 427; *Ives v. Bosley*, 35 Md. 262; s. c., 6 Am. Rep. 411; *Burton v. Hansford*, 10 W. Va. 470; s. c., 27 Am. Rep. 571; *Barlow v. Myers*, 64 N. Y. 41; s. c., 21 Am. Rep. 582; 582; *Leonard v. Vredenburg*, 8 Johns. 29; 5 Am. Dec. 317. Where the indorsement or guaranty is made for the purpose of procuring credit for the note, the indorsers or guarantors are liable. *Cromwell v. Hewitt*, 40 N. Y. 491; *White's Bank v. Myles*, 73 id. 335; s. c., 29 Am. Rep. 157; *Burton v. Hansford*, *supra*; *Moore v. Cross*, 19 N. Y. 227; *Richards v. Waring*, 1 Keyes, 576; *Chaddock v. Van Ness*, 35 N. J. 517; s. c., 10 Am. Rep. 256; *Eilbert v. Finkbeiner*, 68 Penn. St. 243; s. c., 8 Am. Rep. 176; *Rothschild v. Griz*, 31 Mich. 150; s. c., 18 Am. Rep. 171; *Jones v. Goodwin*, 39 Cal. 493; s. c., 2 Am. Rep. 473, and note by reporter. The note and guaranty are to be read together, and the words "value received," on the face of the note, express the consideration for both. *Houghton v. Ely*, *supra*; *Sears v. Loy*, 19 Wis. 96; *Washburn v. Fletcher*, 42 id. 152; *Dahlman v. Hammel*, 45 id. 466; *Leonard v. Vredenburg*, *supra*. Although the consideration for a promise may pass to a third person, and not to the promisor, still, if the promise is made at the time the credit is given, and it is given on the strength of such promise, it is held to be an original undertaking, and not within the statute of frauds. *Hall v. Wood*, 4 Chand. 36; 3 Pin. 308; *Thayer v. Gallup*, 13 Wis. 539; *Snyder v. Wright*, id. 691; *Dyer v. Gibson*, 16 id. 557; *Shook v. Vanmater*, 22 id. 532; *Putney v. Farnham*, 27 id. 187; *Vogel v. Melms*, 31 id. 306; *Young v. French*, 35 id. 111; *Hull v. Brown*, id. 652; *Cady v. Shephard*, 12 id. 639; *Davis v. Barron*, 13 id. 227; *King v. Ritchie*, 18 id. 554; *Jones v. Goodwin*, 39 Cal. 493; s. c., 2 Am. Rep. 473; *Ricard v. Sanderson*, 41 N. Y. 179; *Barker v. Bradley*, 42 id. 316; *Coster v. Mayor*, 43 id. 399; *Barlow v. Myers*, 64 id. 41; s. c., 21 Am. Rep. 582; *Vrooman v. Turner*, 69 N. Y. 280; s. c., 25 Am. Rep. 195; *Miller v. Winchell*, 70 N. Y. 437; *Pomeroy on Spec. Perf.* 548.

Charles W. Felker, for respondents.

COLL, J. The ruling of the county court sustaining the demurrer to the complaint is clearly supported by the decision in *Taylor v. Pratt*, 3 Wis. 674, decided by this court a quarter of a century ago. The facts stated in the complaint are substantially the same as those presented on the record in that case; consequently the order cannot be reversed without overruling *Taylor v. Pratt*.

We are decidedly opposed to unsettling a rule of law of such practical importance in the business transactions of every day, which was established so long ago upon the fullest argument, after great deliberation, whatever might be our views upon the point as a new question. "Stability and certainty in the law are always of the first importance. They are more especially so in cases arising under the statute of frauds than any other. There is no statute the provisions of which enter more frequently into the transactions of trade and commerce. It is a matter of daily and hourly interest that they should be remembered and attended to." DIXON, C. J., in *Houghton v. Ely*, 26 Wis. 181-195. These observations of the chief justice have great weight in cases of this character. The learned counsel for the plaintiff insists that the doctrine of *Taylor v. Pratt* has been greatly weakened, if not directly overthrown, in subsequent cases decided by this court. But this is a mistake. It is true, DIXON, C. J., in *Houghton v. Ely*, makes a vigorous attack upon the doctrine of *Taylor v. Pratt*, and attempts to show that it is unsound in principle and opposed to the great weight of authority. But the majority of the court did not concur in the chief justice's strong disapproval of the doctrine of *Taylor v. Pratt*. For while I agreed with the chief justice in holding the defendants, in *Houghton v. Ely*, as not within the protection of the statute of frauds, and liable as joint makers—they having written their names on the back of a non-negotiable promissory note, at the time it was made and delivered to the payee, for the purpose of giving the instrument additional credit,—I stated that I should adhere to the decision in *Taylor v. Pratt* in a case presenting the same facts.

Mr. Justice PAINE combated the views of the chief justice in an opinion marked by his usual clearness of reasoning and logical precision, saying that while the decision in *Taylor v. Pratt* stood opposed to an indefinite number of authorities, there was still no

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doubt that it was in accordance with the statute of frauds, and he thought the contract of defendants in *Houghton v. Ely* came within the principle decided in the former case. But the majority did not, in *Houghton v. Ely*, attempt to overrule *Taylor v. Pratt*, and the latter case stands to-day as the law of this State upon the point decided. That point was, as stated by Mr. Justice PAINE, in his opinion just referred to, that a written guaranty upon a negotiable promissory note, though referring to the note, and though made at the same time with the note, and constituting a ground of the credit given to the maker, was void within the statute of frauds, because it did not express the consideration for the guaranty. Page 204. The facts set forth in the complaint show that this was the precise nature of the guaranty entered into by the defendants. In other words, it is the case of *Taylor v. Pratt* over again, in every essential element, fact and feature. The decision must be now, as it was then, against the validity of the guaranty. It is idle to enter upon any general discussion of the question involved. It is sufficient to say that the point has long since been decided against the plaintiff, and the argument on both sides of the question entirely exhausted. We have no hope that we could add any thing valuable to the discussion if we were to try, and we therefore affirm the order.

The order of the county court is affirmed.

Judgment affirmed.

MERRELL V. CAMPBELL.

(49 Wis. 535.)

Municipal corporation — garnishment.

A municipal corporation is not subject to garnishment, for a debt to a citizen.*

GARNISHMENT proceedings against a county clerk, in respect to county orders for money. The garnishee had judgment below.

Thomas & Fuller, for appellant.

M. M. & D. Webster, for respondent.

*To same effect, *Memphis v. Lusk* (9 Heisk. 511), 24 Am. Rep. 337.

LYON, J. [Omitting a minor consideration.] But there is another and an insurmountable impediment to a recovery against the garnishee. The county clerk is the mere agent or instrument of the board of supervisors; his custody of the orders in question was the custody of the county; and although this garnishee proceeding is in form against the county clerk, in substance and legal effect it is against the county. It has been the settled law of this State for nearly twenty years, that a municipal corporation is not subject to garnishment; and it is too late to change the rule by judicial determination. *Burnham v. Fond Du Lac*, 15 Wis. 193; *Buffham v. Racine*, 26 id. 449. The principle of the rule was also asserted in *Hill v. La Crosse & Mil. Railroad Co.*, 14 Wis. 291.

[Minor matter omitted.]

Judgment of the Circuit Court is reversed, and the cause remanded with directions to that court to dismiss the garnishee proceedings.

Judgment reversed.

DELLS V. KENNEDY.

(49 Wis. 535.)

Constitutional law — qualifications of voters — registry.

Where the Constitution prescribes the qualifications of voters, without requiring registration, a statute which adds an enactment that no person shall vote unless registered according to the provisions of the act, is invalid. (See note, p. 790.)

ACTION against inspectors of public election for refusing vote. The opinion states the case. The defendants had judgment below on demurrer.

Howard Morris and *Samuel Howard*, for appellants.

L. S. Dixon, for respondents.

ORTON, J. This action is brought against the defendants for refusing, as the inspectors of election of the first precinct of the fifth ward of the city of Milwaukee, the vote of the plaintiff offered

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at the general election of 1879. The complaint shows that the plaintiff had all the qualifications of a legal voter, at such election and in such precinct, required by article 3, section 1, of the Constitution of the State, and the general election laws, but fails to state that he had complied with the provisions of chapter 235 of the Laws of 1879, requiring his previous registration to entitle him to vote, or that he was within the exception mentioned in the eighth section of said act. This act requires, as a prerequisite to the exercise of the constitutional right to vote at any general election named in the act, the previous registration of the elector, unless he becomes a qualified voter after the last day for completing the registry and before the election. The demurrer to the complaint was sustained by the Circuit Court, on the ground that the plaintiff had not become a registered voter as required by said act, and was not within said exception. Section 8 of the act absolutely prohibits any elector from voting at such election unless so registered or within such exception; and the only question, therefore, for the consideration of this court on this appeal is of the validity of said act. A few plain and unquestionable propositions will sufficiently present the views of this court upon the question of the constitutionality of this act.

The elector possessing the qualifications prescribed by the Constitution is invested with the constitutional right to vote at any election in this State. These qualifications are explicit, exclusive, and unqualified by any exceptions, provisos or conditions; and the Constitution, either directly or by implication, confers no authority upon the legislature to change, impair, add to or abridge them in any respect. In the language of the chief justice in *Page v. Allen*, 58 Penn. St. 346: "These are the constitutional qualifications necessary to be an elector. They are defined, fixed and enumerated in that instrument. In those who possess them is vested a high, and to a freeman, sacred right, of which they cannot be divested by any but the power which establishes them, viz.: the people, in their direct legislative capacity. This will not be disputed. For the orderly exercise of the right resulting from these qualifications, it is admitted that the legislature must prescribe necessary regulations as to the places, mode and manner, and whatever else may be required to insure its full and free exercise. But this duty and right inherently imply that such regulations are to be subordinate to the enjoyment of the right, the exercise of which is regulated. The right must not be

impaired by the regulation. It must be regulation purely, not destruction. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely excinded, under the name or pretense of regulation, and thus would the natural order of things be subverted by making the principal subordinate to the accessory. To state is to prove this position. As a corollary of this, no constitutional qualification of an elector can in the least be abridged, added to, or altered, by legislation or the pretense of legislation. Any such action would be necessarily absolutely void and of no effect."

The learned counsel of the respondents, in respect to the provisions of this law, used the following language in his printed argument: "No elector need lose his right to vote. No elector can do so except by his own default or negligence in these particulars." If this were a correct statement of the effect of this law, then it might not be obnoxious to objection in the particular, which, in our opinion, renders it unconstitutional and void. By the effect of this law the elector *may*, and in many cases *must* and *will*, lose his vote, by being utterly unable to comply with this law by reason of absence, physical disability or non-age, and an elector can lose his vote without his own default or negligence in these particulars.

This language of the learned counsel is most strikingly suggestive of the very vice of this law which is fatal to its validity. That vice is, that the law disfranchises a constitutionally qualified elector, without his default or negligence, and makes no exception in his favor, and provides no method, chance or opportunity for him to make proof of his qualifications on the day of election, the only time, perchance, when he could possibly do so. This law undertakes to do what no law can do, and that is to deprive a person of an absolute right without his laches, default, negligence or consent; and in order to exercise and enjoy it, to require him to accomplish an impossibility.

No registry law can be sustained which prescribes qualifications of an elector additional to those named in the Constitution, and a registry law can be sustained only, if at all, as providing a reasonable mode or method by which the constitutional qualifications of an elector may be ascertained and determined, or as regulating reasonably the exercise of the constitutional right to vote at an election. If the mode or method or regulations prescribed by law for such purpose and to such end, deprive a fully qualified elector

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of his right to vote at an election, without his fault and against his will, and require of him what is impracticable or impossible, and make his right to vote depend upon a condition which he is unable to perform, they are as destructive of his constitutional right, and make the law itself as void, as if it directly and arbitrarily disfranchised him without any pretended cause or reason, or required of an elector qualifications additional to those named in the Constitution. It would be attempting to do indirectly what no one would claim could be done directly. It is quite immaterial to the point of this discussion what this court may have decided in respect to the registry law of 1864, or other laws, any further than the establishment of a principle which may be applicable to and govern this peculiar feature of the law of 1879; and the decisions of other courts in respect to registry laws not having in effect this provision, need not be here reviewed.

Without further discussion of original principles, it is sufficient and conclusive of this case that this court, in *State ex rel. v. Baker*, 38 Wis. 71, virtually decided the question here raised, and established the principle which is applicable and fatal to this sweeping provision of disfranchisement found in section 8 of the law under consideration. In that case the registry of a precinct was defective in substance and form, and yet the electors named therein are held to have been entitled to vote at the election, because they had no notice of such defect and were themselves not in fault. In the able discussion of the subject, as to the extent of legislative authority in regulating the exercise of the constitutional right to vote, by his honor, the chief justice, which I need not generally repeat, it is said, touching this exact point: "The voter may assert his right if he will, by proof that he has it; may vote, if he will, by reasonable compliance with the law. His right is unimpaired, and if he be disfranchised it is not by force of the statute, but by his own voluntary refusal of proof that he is enfranchised by the Constitution." And again: "So one entitled to the franchise may be sick, or absent, or imprisoned, or otherwise disabled, at the time of the registry. But the Constitution vests and warrants the right at the time of election, and every one having the constitutional qualifications then may go to the polls, vested with the franchise, of which no statutory condition precedent can deprive him, because the Constitution makes him, by force of his present qualifications, 'a qualified voter at such election.'"

In case the voter knows, or has notice, that his name is not on the registry, the opinion further holds: "So that they have an opportunity, if they will, to remove the difficulty, each voter for himself, by complying with the statutory conditions. In such case, if a voter be disfranchised, he is by his own omission a voluntary party to his disfranchisement." This language was clearly and pointedly illustrative of the real question in that case, and is authoritative in its application to the law of 1879, and conclusive of this case.

The prohibition in section 8 is clearly unconstitutional and void. This section is the only portion of the act which provides for the legal effect and consequences of the registration, or want of registration, required and regulated by the other portions of the act, and which are essential to the full force, purpose and efficiency of such registration, and of paramount importance, and constitute the only substantial change of, and material difference from, the general law of the State requiring registration; and it is therefore quite apparent that the legislature would not have enacted the other portions of the act had they foreseen that the courts would declare such part of section 8 unconstitutional and void. This case is therefore brought within the rule repeatedly recognized by this court for declaring the whole act void. *Slauson v. City of Racine*, 13 Wis. 398; *State v. Dousman*, 28 id. 541; *Slinger v. Henneman*, 38 id. 504. *Judgment reversed.*

NOTE BY THE REPORTER.—TAYLOR., J., dissenting, observed among other things: "It is argued that the legislature has no power to impose any other conditions upon the right of the elector to vote than such as are prescribed by the Constitution; and it is urged that a registry law which requires the elector to make proof of his right to vote at any time before the day of the election is imposing a condition not recognized by the Constitution. All agree that the legislature must necessarily prescribe the manner of voting, designate the officers who shall receive and canvass the votes, the place where the votes shall be received, and the form of the ballot voted, and may also prescribe what proof the elector shall make of his right to vote at an election, and generally do all that may be deemed reasonably necessary to secure a fair and honest vote of the electors. If in the judgment of the legislature, it be necessary that the proof of the elector's right to vote at any election, in order to secure a fair and honest vote, shall be made on some convenient day or days previous to the day fixed for the election, what constitutional provision forbids the legislature from requiring such proof to be so made? Certainly the law which is under consideration is not onerous in its provisions, and every elector can make his proof by procuring his name to be entered upon the proper register, at much less trouble and expense than would be required to make formal proof of his right to vote on the day of election; and yet it cannot be said that the legislature would not have the power to require each elector who offered to vote on the day of the election to furnish proof by his own affidavit, backed by the affidavit of some other person or persons, of his right to vote, and that on his failure to do so his vote should not be received."

"Experience has demonstrated that registry laws are necessary to insure a fair and honest vote in all large cities, and such laws have been enacted and enforced in such cities

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in very many of the States of the Union for many years. In order to preserve even a pretense of purity in elections in the large centers of population, it is necessary that evidence of this right of the electors to vote should be produced before the day of the election. In order to enable the real electors to vote on that day; and it would be highly inconvenient, if not impossible, to make the necessary investigations on that day. Registration is in fact nothing more than a method of taking evidence beforehand of the right of the elector to vote on the day of the election. The registry law in question in this case throws no obstructions in the way of the elector who desires to vote. If he voted at the last previous election, his name is placed on the register without any action on his part; if he did not, he can have it placed there by appearing in person before the board, or by sending a written request to have it placed thereon. If his right to be registered is questioned, his name is placed thereon upon making the same proof he would be required to make if challenged on the day of election. There is no hardship in the law.

"It is urged that the voter may be sick or absent or imprisoned on the days when the registry is made. The law provides for these cases so far as it is reasonable it should provide. If the elector is absent, the law advises him when the registry will take place, and he may send his application to be registered in writing; he need not appear in person. Even if he were imprisoned, his right to send a written request to be registered would hardly be denied him. But these are all questions addressed to the consideration of the legislature, and not to the court. It is for the legislature to say what shall be sufficient to excuse the elector from registering as required by law; and when the legislature has passed a law which gives ample opportunity for every elector to register if he will, the court is, in my opinion, transcending its power in declaring the law void because the legislature has said to the elector, 'Unless you register you cannot vote.' There does not appear to me to be any middle ground. The elector has the absolute right to vote on the day of election if he has then the qualifications of an elector under the constitution, and is then ready to make proof of his qualifications, as was stated by the chief justice in the case of *State v. Baker*, 38 Wis. 71; or else he must, if required by law, furnish the proof of his right to vote by registering on the days fixed by the legislature previous to the day of election, or he may be prohibited from voting. That the elector may be absent on the days fixed for registering, that he may be sick or imprisoned, or that in the hurry of business he may wholly forget that he is required to register, until it is too late, cannot excuse the elector from doing that which is necessary to secure a fair election. These accidents are not the fault of the law, and cannot affect its validity.

"Every objection which is made to this law was made fifty years ago to a similar law in Massachusetts; and they were fully and most satisfactorily answered by Chief Justice Shaw in his opinion in *Capen v. Foster*, 12 Pick. 485. His argument in that case was so clear, exhaustive and satisfactory, and his conclusions so well established, that every court in the United States which has since had under consideration similar registry laws has followed and approved that decision, unless the case of *State v. Baker* be an exception. The law of Massachusetts, which was under consideration in that case, was subject to every objection which can be urged against the law of this State now under consideration."

"In *Hyde v. Brush*, 34 Conn. 454, the court sustained a registry law which provided that no person should vote unless his name was on the registry; and the law of Connecticut provided, as our own law does, that the registry should be completed on the Wednesday before the election, except that persons who became electors by naturalization or age after that day might be entered on the register after that date. In *People v. Koppkekom*, 16 Mich. 342, the Supreme Court of that State unanimously declared the registry law of the State constitutional and valid, which prohibited any voter from voting whose name was not registered. The only difference between that law and the one under consideration in this case is, that it permitted, in the discretion of the inspectors, a person to register and vote upon the day of the election upon his satisfying the inspectors, by his testimony under oath, that he was a qualified elector, and 'that owing to sickness or bodily infirmity of himself or some near relative residing in the same household (giving the name of said relative), or owing to his absence from the township on public or official business, or his own business, and without intent to avoid or delay his registration during the then last session of the board, he has been prevented from causing his name to be previously registered; and also producing some qualified elector, not a candidate for office at such

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election, to make oath before the inspectors that he is well acquainted with the applicant for registry, and that he has good reason to believe, and does believe, that all the statements of the applicant are true.'

"In *Edmonds v. Banbury*, 38 Iowa, 267, the Supreme Court of Iowa held a registry law valid which prohibited the elector from voting unless his name appeared on the registry made and corrected previous to the election, but allowed the non-registered elector to vote provided he made an affidavit showing that he was a qualified elector, and also 'showing a proper reason for not appearing before the board on the day for correcting such register, and the affidavit of a person whose name is on the register that he knows such person to be a resident of the township.'

"*People v. Latne*, 33 Cal. 55, and *Webster v. Byrnes*, 34 id. 273, the Supreme Court of California held a registry law valid which absolutely prohibited any person from voting whose name did not appear upon the register or poll list previously prepared. The law is very elaborate in its provisions: and although the elector may, under certain circumstances, have his name entered on the poll list at any time before the poll of the election is opened, on the day of election, yet in order to get it entered thereon after thirty days before the day of the election, he must, in addition to further proofs, furnish the board of registration his affidavit setting forth reasons satisfactory to the board why he did not apply and procure the enrollment of his name on said poll list previous to said thirty days.

In New York there has been a registry law for the cities of the State for more than fifteen years, in all respects like the law now under consideration, except that the law of 1865 provides that the board of registry shall be in session on the Monday before the election for the purpose of making corrections and revising the same; and the law as amended in 1872 provides that the registry shall be completed on the Saturday next before the election; but both the law of 1865 and that of 1872 absolutely prohibit every person from voting whose name is not on the register, and its constitutionality has never been questioned by the courts or the profession of that State. In the only cases which have been brought to our notice in the courts of that State in which the validity of the law might have been considered, it does not appear that its invalidity was suggested either by the counsel or the court. *People v. Thacher*, 55 N. Y. 525; *People v. Wilson*, 63 N. Y. 186. It would seem highly improbable that a law which infringed the constitutional rights of the electors of that great State would be quietly submitted to and remain unquestioned by the electors, the legal profession, and the courts of the State, for fifteen years and more.

"In *Byler v. Asher*, 47 Ill. 101, it was held that the registry law of Illinois was a valid law. This law is similar in all respects to the act of 1864 of this State, except that the non-registered voter was allowed to vote on making proof in the manner prescribed in the statute of his right to vote, on the day of the election, without showing any excuse for not registering. In this case the learned judge who delivered the opinion says: 'There can be no question that the legislature may provide all reasonable safeguards to preserve the ballot-box from fraud, and to maintain the purity of our elections. As the wisdom of our laws, and the fair and impartial administration of justice depend upon the officers chosen by the people, and even the perpetuity of our present form of government can only be maintained by preserving our elections free from fraud and corruption, all reasonable requirements for the purpose, not calculated to abridge the elective franchise, are within the scope of the legislative power.'

"*Davis v. School District*, 44 N. H. 398, although not a case arising under a registry law, involved the same principles, and the court cited *Copen v. Foster* with approval."

"The only cases which have been brought to our attention in which the power of the legislature to pass a registry law has been seriously questioned, since the decision in the case of *Copen v. Foster*, are *Page v. Allen*, 58 Penn. St. 338, and *Patterson v. Barlow*, 68 id. 54. In the first case the majority of the court held the law of Pennsylvania then under consideration void; but it will be seen, by an examination of the case, that the third judge who concurred in the majority opinion holding the law void, did so expressly on the ground that it was so framed as to necessarily deprive one class of electors of the right to vote. Chief Justice THOMPSON, who delivered the opinion of the court holding the act void, bases his opinion upon two grounds: first, that it is impossible to execute the law; and second, that the law necessarily deprived one class of electors of the right to vote." "Justices AGNEW and READ, who dissented and held the law constitutional, gave such a construction to the act as to avoid the difficulty found by the majority."

LITTLE V. CITY OF MADISON.

(49 Wis. 605.)

Municipal corporation — negligence — exhibition of animals in street — license.

A city licensed an exhibition of wild animals, without specifying any place.

The owner exhibited them in a public street; whereby the plaintiff's wife sustained a personal injury. *Held*, that the city was not liable. (*See note, p. 795.*)

ACTION of negligence for personal injury. The facts will be found in the former report of the case, 24 Am. Rep. 435. After that decision, the defendant answered, admitting that the officers of the city granted a license to one Carr to exhibit a bear or bears in the city, but denying that such license authorized such exhibition to be made upon any public street, and alleging, in substance, that the license was granted with full notice and instructions to Carr that the exhibition must be made "in some lot or inclosure or building away from the public streets and thoroughfares in said city." The answer further alleged, that if the exhibition was in fact given in a public street, it was so given in violation of said license, notice and instructions, and of law, and without the knowledge of the city or its officers or agents; and that if State street was incumbered or obstructed, or a nuisance was created therein, by such an exhibition, the city, its officers and agents, had no notice or knowledge thereof before the time of the injury complained of. The opinion states other facts. The plaintiff had judgment below.

Smith & Lamb, for appellants.

Gill, Bashford Spilde and Wm. F. Vilas, for respondent.

COLE, J. The learned Circuit Court instructed the jury, in substance, that the defendant city was liable for the injury sustained by the plaintiff's wife, if its police officers or proper authorities were negligent in failing to prevent the bear show in the street. This was supposed to be the meaning of the decision of this court on the former appeal, as reported in 42 Wis. 643; s. c., 24 Am. Rep. 435. It is possible that this is an admissible construction of the opinion, arising from its brevity, and from the failure of the writer

to express with precision the real ground upon which the complaint was held good. But it is to be regretted that the opinion is open to that construction, for certainly the writer did not intend to rest the liability of the city upon any such ground. In *Schultz v. City of Milwaukee*, 49 Wis. 254 (*ante*, p. 779), Mr. Justice LYON states accurately the ground of that decision, in saying that "the complaint was construed as alleging that the authorities of the city expressly authorized or licensed the exhibition of the bears on State street, knowing the dangerous character of the exhibition." I say in the opinion, that the allegations of the complaint show that the agents of the city not only knowingly and carelessly allowed one of its principal streets to become obstructed by an exhibition of wild animals therein, which exhibition was calculated to produce injury to persons lawfully travelling along the street, but that it was averred that such exhibition was authorized and sanctioned by the city. By this language was meant that the city expressly authorized the bear show in the street; in other words, granted the license to Carr to exhibit the animals in that place according to the complaint. But it was not intended to affirm the doctrine that the city was liable if its police officers neglected to prevent the owner of the bears from making an improper use of the street for a show ground.

The distinction seems obvious between a case where the officers of the city authorize and license a show in the highway—that is, become themselves active agents in the commission of the wrong,—and one where they are merely negligent in preventing such show or improper use of the street. Doubtless the city officers were in duty bound to be diligent to prevent the show in the street where it might cause injury to persons travelling thereon. But if they failed to perform that duty, and an injury resulted from this omission, we do not understand that the law renders the city liable for such neglect. It was further suggested that the liability of the city arose from the fact that it granted a license for the exhibition, for which a fee was received which went into the city treasury. But this fee was not exacted merely for revenue. The granting of licenses for shows was a police regulation, and the fee demanded was not intended to be for revenue, strictly speaking. It appears in this case that the license was a general one "to give a bear show" on the day named. It was not necessary to state in the license that the exhibition was to be at a proper place, away from the public street. This would be implied. As a matter of fact, it appears

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that Carr was told by several of the officers of the city that he must not exhibit the bears on the street, but go off on some private lot. Still, we must assume that the jury found, under the charge of the court, that the officers were negligent in not taking effectual means to prevent the exhibition on the street before the accident happened; that is to say, they were guilty of a nonfeasance, or an omission of duty as public officers. But for such negligence no action will lie against the city. *Schultz v. City of Milwaukee, supra*. Even the granting of a license did not, under the circumstances, impose upon the city the responsibility of seeing that the exhibition was had in a suitable place, and conducted in a proper manner. All this would be implied; the licensee would attend to it himself. Nor should the receipt of a license fee be considered as affording a consideration for an implied undertaking on the part of the city to be answerable for the neglect of its police officers to perform their official duty and prevent the exhibition in an improper place. The show licensed was not necessarily dangerous to travellers on the streets, or to any one, if it had been held on a private lot, as the city officers doubtless expected it would be. In any view which we have been able to take of the case, we think the instruction of the court as to the liability of the city is erroneous, and that there must be a new trial.

Judgment reversed, and new trial awarded.

NOTE BY THE REPORTER. — In *Cole v. City of Newburyport*, Massachusetts Supreme Court, 1880, the declaration alleged that the city, by its clerk, duly authorized, contracted with the owners of an animal, known as the "Sacred Ox," authorizing them to erect a booth on Market square, and to occupy the highway for the use and exhibition of the animal for the consideration of \$2.50 a day; that the mayor and aldermen of the city, by the city ordinances, are authorized to grant permission to maintain tents and booths in public places and upon the public highways for the purpose of exhibition, and are authorized to lease and grant permission to use the same; that the ox emitted an offensive odor, which in its nature is obnoxious to horses and cattle, frightening and causing them to become unmanageable; that the ox was also of an uncouth and strange shape and appearance, and was caparisoned in a gaudy and strange manner, so that he was an object of terror to horses and cattle; that the plaintiff's cart and horse were lawfully travelling along Merrimac street, the horse being well broken and kind, and being driven by a safe and experienced driver, who exercised due caution, and near Market square met the ox, which was being led back and forth for his usual and necessary exercise: and that the horse was frightened by the odor and frightful appearance and caparison of the ox, and ran and overturned the cart, damaging it so that it was substantially destroyed, and seriously injuring the horse. The defendant demurred. The demurrer was sustained, on the ground that at the time of the accident the ox was not in the place for the use of which the city received compensation, nor in charge of any agent of the city, and the city was not responsible for the fright while both animals were travelling along the highway.

In *Eivers v. City Council of Augusta*, Georgia Supreme Court, Nov. 1880, it was held, where the city council passed an ordinance forbidding the running at large of cattle in its

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streets, but subsequently suspended its operation indefinitely, on the ground, among others, that the growth of weeds and grass was too luxuriant for comfort, health and good appearance; that one who was gored by a cow running at large in the streets would not have a cause of action against the city. Nor would the principle be altered by the fact that the owner paid a municipal tax on the cow.

See *Schultz v. City of Milwaukee*, ante, p. 779.

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(49 Wis. 661.)

Trespass — sale and removal of timber wrongfully cut.

Where one wrongfully cuts timber on the lands of another and sells it to an innocent purchaser, the entry upon the lands and removal of the timber by such purchaser is trespass.

TRESPASS. The facts sufficiently appear in the opinion. The defendant had judgment below.

G. W. Hazelton, for appellant, in person.

G. W. Cate, for respondent.

COLE, J. In the court below this was treated as an action of trespass for unlawfully entering upon the plaintiff's land and cutting and removing therefrom a quantity of pine timber. There was no dispute on the trial that the logs were cut on the plaintiff's land, and that the defendant Week had them and manufactured them into lumber. Nor was there any claim that defendant Week himself cut any of the logs. It is clearly established by the evidence, and the fact is conceded, that he did not, but that the defendant Hughes, with his brother, and persons employed by them, actually cut the timber. The contention in the court below was, whether Week employed the brothers Hughes to cut the timber, agreeing to pay them for their work, or whether he simply agreed to buy the logs of them, which they cut on their own responsibility.

It seems to have been assumed by the learned Circuit Court, that if Week merely agreed to buy the logs which Hughes cut, then he would not be responsible in this action of trespass; for the court in effect charged upon this question, that if the jury found from the testimony that Week employed Hughes to cut the logs for him

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agreeing to pay him for his work, then he would be liable for the trespass; but if the agreement simply was that Week would buy the logs which Hughes got out, and then Week took them under that arrangement, without notice or knowledge of the trespass by Hughes, then he would not be liable in an action for such trespass. This charge was excepted to by the plaintiff; and in view of the evidence there can be no doubt that it was well calculated to mislead the jury to his prejudice. It may be assumed at the outset that Week purchased the logs of the Hugheses, as he said he did, in good faith, without notice that they had been guilty of trespass in cutting them. He was sworn on his own behalf on the trial, and testified to this effect. He says that the agreement was that he was to purchase the logs which the Hugheses should cut, at three dollars per thousand, they furnishing their own timber. He admits that he went upon the plaintiff's land not knowing who owned it at the time, and examined the logs, which were banked thereon. He denies, however, that he knew these logs had been cut upon this land. But he says that he furnished a man to aid in scaling the logs, and on his cross-examination makes this admission: "I removed the timber from the land, or my men did, and I paid them for it. Frank helped, and that was a part of the bargain, that he should help get the logs into the creek. I paid for men to go up and get the logs and drive them down. * * * I did not know when I made the bargain with the Hugheses, in the fall of 1875, that they had previously trespassed on lands where they had no right."

Now, assuming, as we do, that this is a true version of the transaction—that Week had merely agreed to purchase of the Hugheses the logs which they might cut and get out—yet if the Hughes brothers entered upon the plaintiff's land without right or authority, and committed a trespass by cutting the timber standing thereon, and Week, with his servants, also entered upon the premises and removed the logs and converted them to his own use, he is responsible equally with the Hugheses to the owner, or plaintiff, for the value of the logs thus carried away. The Hughes brothers certainly acquired no title to the timber by severing it from the soil; they were simply wrong-doers, and consequently could confer no title by the formality of a sale. As soon as the timber was cut it became the personal property of the owner of the land, and Week, in going upon the premises and removing the logs without authority from

such owner, was a trespasser, and liable in damages for the wrong. It is not essential to that responsibility that the element of a willful or intentional trespass should enter into the transaction; it was sufficient that he was taking away property which he had no right to remove. If he did not know who owned the land, he was bound to know that the logs severed from the soil were the property of the owner, whoever he might be, and that without the consent of such owner he had no right to interfere with the property. The rule of law is well settled in this court.

In *Dexter v. Cole*, 6 Wis. 319, which was an action of trespass, it appeared that the defendant, who was a butcher in Milwaukee, was driving some sheep he had purchased, toward the city, upon the highway, when they became mixed with a small lot belonging to the plaintiff, which were running at large upon the highway. The defendant drove the whole flock into a yard near the road for the purpose of parting them, and did throw out a number which he did not claim, and pursued his way with the remainder to his slaughterhouse, where they were slaughtered in his business. The evidence tended to show, and the jury found it did show, that some four of the plaintiff's sheep remained in the flock, and were driven to Milwaukee and slaughtered. The court sustained the action on the ground that any unlawful interference with, or acts of ownership over, property, to the exclusion of the owner, was sufficient to sustain the action, and that it was not necessary to show actual or forcible dispossession of property; that the intent did not necessarily enter into the trespass; that it was sufficient if the act done was without a justifiable cause or purpose. But perhaps the case nearest in point to the one at bar is *Higginson v. York*, 5 Mass. 341. The head note thus states the case: "A., having entered the close of B., and having cut a quantity of cord wood, sells the same to U., who hires D., the master of a coasting vessel, to go in company with C. and transport the wood to market. D. was held liable for the value of the wood in an action of trespass *quare clausum fregit*, brought by B., although it was agreed he was ignorant of the original trespass committed by A."

In *Hobart v. Hagget*, 12 Me. 67, which was an action of trespass for taking an ox belonging to the plaintiff, it was proved that the defendant met the plaintiff in the street, and bought of the latter an ox, which the plaintiff directed him to go and take out of his inclosure, and the defendant, by mistake, took the wrong ox. The

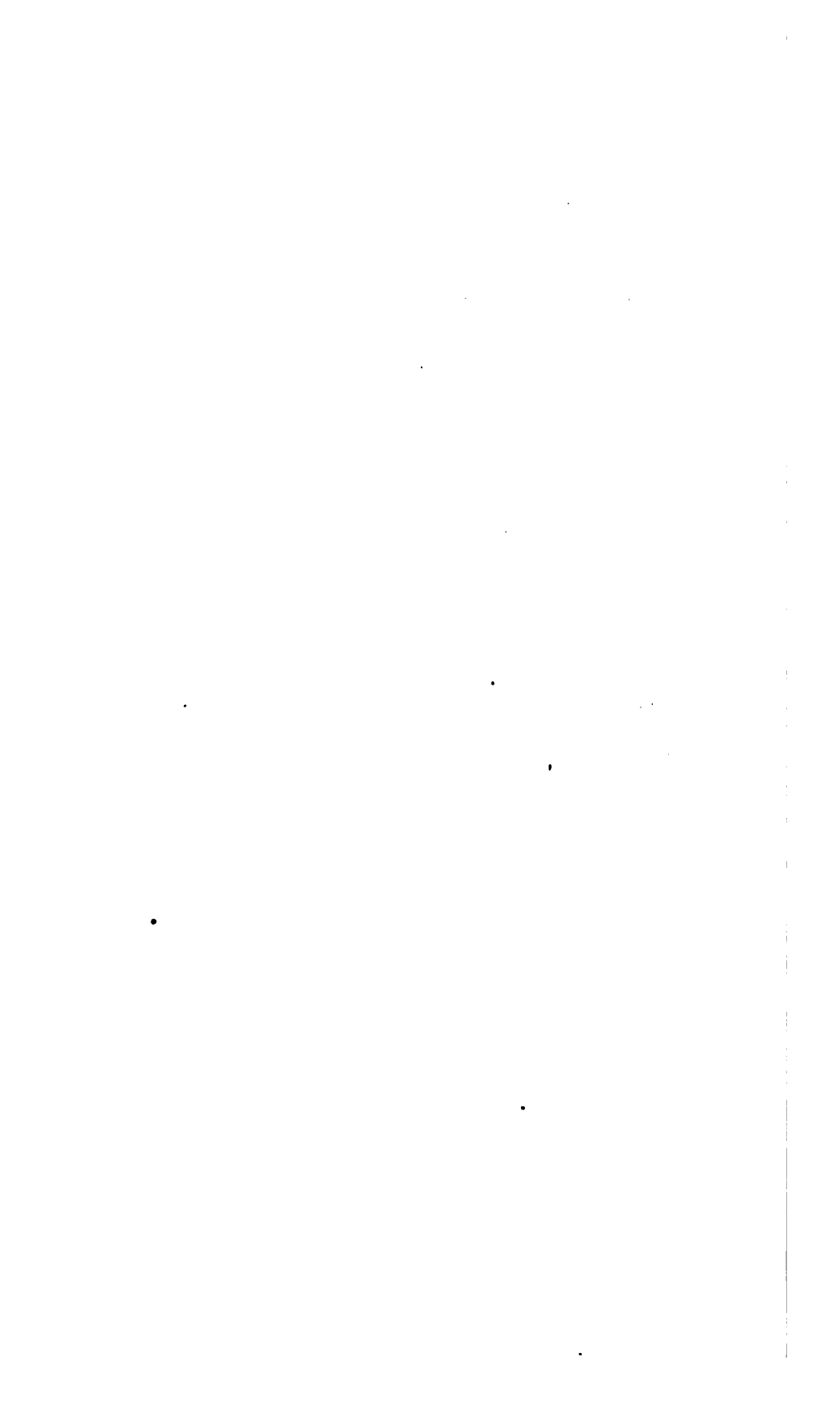
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defendant was held liable in the action. The court says: "The taking of the plaintiff's ox was the deliberate and voluntary act of the defendant. He might not have intended to commit a trespass in so doing. Neither does the officer, when, on a precept against A., he takes, by mistake, the property of B., intend to commit a trespass; nor does he intend to become a trespasser who, believing that he is cutting timber on his own land, by mistaking the line of division, cuts on his neighbor's land; and yet in both cases the law would hold them as trespassers." Cooley on Torts, 348, lays down the same doctrine.

But it would seem to be quite unnecessary to extend our remarks upon this question. The above authorities, and others which might be cited, of the same import, abundantly show that the defendant Week, by entering upon the premises of the plaintiff and removing therefrom the logs in controversy, was simply a wrong-doer, and is responsible in damages for the value of the property taken. If he did not intend to commit a trespass, of course no exemplary damages could be recovered against him; but he is surely liable, upon every just principle, for the value of the property which he unlawfully removed and converted to his own use. Therefore, without noticing the other questions discussed on the briefs of counsel, we must reverse the judgment and order a new trial.

It is so ordered.

Judgment reversed, and new trial ordered.



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1. *Bank receiving draft for collection at a distance — action for negligence of sub-agent.] A bank receiving, for collection, a draft payable at a distant place, and transmitting the same to a reputable agent at that place, is not liable for loss incurred by the negligence of the latter, and having voluntarily paid the claim of the payee, cannot maintain an action for such negligence against such agent. Bank of Louisville v. First National Bank of Knoxville (Bart.), 691.*

2. *To draw bill — strictly construed — estoppel.] An agent authorized to draw a bill of exchange in his own name cannot draw in the name of his principal, and the principal is not estopped from refusing payment by his previous payment of a similar bill. Bank of Deer Lodge v. Hope Mining Company (Mont.), 458.*

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- 2. Public policy.]** An agreement by an attorney to turn over to another attorney notes which he holds for collection is invalid. *Smalley v. Greene* (Iowa), 267.
- 3. Restraint of trade.]** An agreement not to practice law in a particular town is valid. *Id.*
- 4. Statute of frauds — time of performance.]** The provision of the statute of frauds respecting contracts not to be performed within a year applies only to those not to be so performed on either side. *Id.*

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1. By agent — estoppel of principal by.] A railroad company is estopped as against a *bona fide* purchaser to deny a bill of lading issued by its authorized agent, although the goods were not received by the company. *Sioux City and Pacific Railroad Co. v. First National Bank of Fremont* (Neb.), 488.

2. Transfer as collateral.] The transfer of a bill of lading as mere collateral security for pre-existing debt does not make the transferee a purchaser for value. *Loeb v. Peters* (Ala.), 17.

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1. Baggage — merchandise — warehouseman.] A carrier of passengers does not insure the safety of samples of merchandise, delivered by a travelling salesman to him as baggage, yet by receiving, carrying, and putting them into his warehouse for safe-keeping, he becomes bound to ordinary prudence in their care. *Pennsylvania Co. v. Miller* (Ohio St.), 620.

2. Bill of lading — what embraced.] Owners of a vessel are responsible only for goods described in the bill of lading and delivered into the custody of the master, at the accustomed place of receipt, and evidence is incompetent to show that the bill was intended to or did include goods elsewhere. *Winters v. Collins* (Me.), 327.

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3. **Evidence to contradict.]** As between the parties to a bill of lading, evidence is competent on the part of the carrier to contradict the admission in the bill that the goods are received for shipment in good order and condition. *Id.*
4. **Common — Liability for goods beyond his terminus.]** A common carrier, receiving goods for transportation which are consigned to a point beyond his terminus, is liable for non-delivery at the destination, in the absence of any express agreement. *Mobile and Girard Railroad Co. v. Copeland* (Ala.), 18.
5. **Connecting line — action for personal injury.]** A passenger by railway, purchasing a ticket over the line of the seller and connecting lines, and injured by the negligence of one of such connecting lines, cannot maintain an action therefor against the seller. *Nashville and Chattanooga Railroad Co. v. Sprayberry* (Bart.), 705.
6. **— baggage.]** A passenger purchased of the A. & G. Railroad Company, at Savannah, a through ticket for Jacksonville, and had his trunk checked by a check marked "A. & G. Railroad." That railroad was only the first of three connecting railroads between those points. The trunk was delivered by that railroad to the second, the passenger retaining the check, and was afterward lost. *Held*, that the passenger could recover therefor of the A. & G. Railroad Company. *Hawley v. Screven* (Ga.), 126.
7. **Contract beyond terminus — station agent.]** A common carrier is not bound by a contract by a station agent for transportation of goods to a point beyond his own line, unless such agent has express authority, or authority may be implied from previous dealings of the parties, or the carrier holds himself out as a common carrier to such point. *Grover & Baker Sewing Machine Co. v. Missouri Pacific Railway Co.* (Mo.), 444.
8. **Drover's pass — special contract.]** A common carrier, transporting cattle for hire, and the shipper on a free pass for the purpose of taking care of the cattle, is a common carrier as to both, and cannot by special contract exempt himself from liability for his own negligence or that of his servants. *Maslin v. Baltimore and Ohio Railroad Co.* (W. Va.), 748.
9. **Exemption — "articles of great intrinsic value" — portrait — measure of damages.]** A family portrait is not an article of "great and intrinsic value," when coupled in an exemption clause in a carrier's receipt, with "specie, drafts, and bank bills;" but the measure of damages for its loss is the value to the owner and not the market value, and so evidence that it was the only one extant would be competent. *Green v. Boston and Lowell Railroad Co.* (Mass.), 370.
10. **Expulsion for non-payment of fare — retaining part fare — offer of balance after stopping and before expulsion.]** A passenger may be expelled from a railway train for non-payment of the whole legal fare, although the conductor retains the portion paid, and although after the stopping of the train to expel him and before expulsion the passenger offers the

CARRIER — *Continued.*

proper balance. *Hoffbauer v. Delhi and North-western Railroad Co. (Iowa)*, 278.

11. Express company — delivery to wrong person.] One forged a telegram in the name of another person, requesting a National bank to forward to Gainesville, Florida, \$500 to such other person. Upon the telegram being received, the agent of such other person gave his note for the money (which was subsequently paid), and the bank forwarded the money, as desired, by express. The express company delivered it to the sender of the telegram. The agent making the delivery knew that the party was a stranger who had just arrived in town. The innkeeper with whom the stranger lodged called with the stranger for the package, and treated him as the party to whom it was addressed, but there was no identification or request by the agent for an identification. *Held*, that while the innkeeper may have been known to the agent as worthy of trust and confidence, the company was liable for the loss occasioned by the delivery to the wrong person. *Southern Express Co. v. Van Meter (Fla.)*, 107.
12. Forwarder — delay — regulations.] A railroad company receiving goods from a connecting railway for carriage, unaccompanied by any bill of back charges, must forward them forthwith, notwithstanding its rule is to require such bill before forwarding. *Dunham v. Boston and Maine Railroad Co. (Me.)*, 814.
13. Freight — delivery at wrong place.] Plaintiff consigned freight by defendant's boats to W. at G. By arrangement between W.'s agent and defendant, of which plaintiff was ignorant, defendant landed the freight on the river bank near W.'s house, and not at G. W. refused to pay charges and take the freight, and defendant subsequently permitted another, unauthorized by W., to take it on paying charges. The plaintiff had no notice of the disposition of the freight. *Held*, that plaintiff could recover the value from defendant. *Howard v. Steamship Co. (N. C.)*, 571.
14. Injury on hand-car.] In absence of proof that a railway company is accustomed to carry passengers upon hand-cars, one who is injured while thus riding has no cause of action against the company, although invited thus to ride by the section foreman. *Hoar v. Maine Central Railroad Co. (Me.)*, 299.
15. *Idem* — delivery of part of freight — right as to balance.] A common carrier, who has delivered part of goods carried without collecting his freight, does not thereby, as matter of law, lose his lien for that freight as against the part undelivered. *New Haven and Northampton Co. v. Campbell (Mass.)*, 360.
16. Trespasser.] A common carrier of passengers is bound to exercise only ordinary care toward trespassers and persons refusing to pay fare. *Regley v. Gilmer (Mont.)*, 450.

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See NEGOTIABLE INSTRUMENT, 814.

CIVIL DAMAGE ACT.

1. *Evidence.*] In an action under the Civil Damage Act, to recover damages to means of support by reason of intoxication caused by liquors sold continuously, during a period of three years, to a person in the habit of getting intoxicated, the defendant may give evidence to show, that during the same period, such person became intoxicated by liquors which he purchased of other persons. *Kirchner v. Myers* (Ohio St.), 598.
2. *Injury to means of support — death.*] In such action, damages resulting from the death cannot be recovered of such person by such intoxication. *Id.*

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Inter-State — receiver.] A receiver, duly appointed in another State, may maintain replevin here for property sent here by him for sale, as against an attaching creditor. *Cagill v. Wooldridge* (Bart.), 716.

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CONSTITUTIONAL LAW.

1. *Damage to fishery.*] One is not entitled to damages for injury to his fishery, resulting from construction of a pier in a river under license from the State. *Vincum Fishing Company v. Carter* (Penn St.), 632.
2. *Suppression of gambling — destruction of tables.*] A statute authorized the police to seize gambling tables and gaming devices used for gambling, and made it the duty of the president of the police to cause the same to be publicly destroyed. This could be done without notice to the owner or any semblance of a judicial investigation. *Held*, unconstitutional. *Lowry v. Rainwater* (Mo.), 420.
3. *Juror not understanding English.*] A juror, not understanding and speaking English, cannot be forced upon a prisoner, although his peremptory challenges may have been exhausted. *McCampbell v. State* (Tex. Ct. App.), 726.
4. *Jury not judges of the law in criminal case.*] In a criminal case the jury are not judges of the law. *Washington v. State* (Ala.), 8.
5. *Legislative diversion of bequests.*] A testator bequeathed the residuum of his estate to the Virginia Literary Fund, a corporation composed only of officers of the State. Subsequently to his death the legislature by enactment appropriated the fund to the Brooke academy, an incorporated

CONSTITUTIONAL LAW — *Continued.*

private educational institution. *Held*, unconstitutional. *Trustees of Brooks Academy v. George* (W. Va.), 760.

6. Qualifications of voters — registry.] Where the Constitution prescribes the qualifications of voters, without requiring registration, a statute which adds an enactment that no person shall vote unless registered according to the provisions of the act is invalid. *Dells v. Kennedy* (Wis.), 786.

7. Right to counsel in criminal case.] A prisoner cannot be tried for felony without counsel to assist him, unless he expressly waives that right. *Valls v. State* (Tex. Ct. App.), 719.

8. Taxation — exemption of widows and maids from.] A statute exempting from taxation property to the amount of \$500 of widows and maids, or any female minor whose father is dead, and whose exempt property does not exceed \$1,000, is unconstitutional because unequal, and not for "charitable purposes." *State ex rel. Tieman v. City of Indianapolis* (Ind.), 223.

CONTRACT.

1. Breach of entire — recovery pro tanto.] On a contract to thresh an entire crop of wheat at a given price per acre, the employee, failing fully to perform, may recover at the contract price for what he has done, less the damages sustained by the employer by the breach of contract. *McMillan v. Malloy* (Neb.), 471.

2. To build scale — breach — tender.] The defendant ordered, through the plaintiff's agent, a scale to be built on defendant's premises, but countermanded the order by telegram before it was communicated to the plaintiff. The plaintiff shipped the necessary iron work to defendant, who refused to receive it, and it remained at the railway. *Held*, that no action for the price could be maintained. *Moline Scale Company v. Beed* (Iowa), 272.

3. Lien on future increase of animals.] Plaintiff's mare having been served by defendant's stallion, plaintiff executed a written agreement to pay defendant twenty dollars in twelve months if the mare proved with foal, "colt holden for payment." *Held*, that the agreement was a mortgage of the colt. *Sawyer v. Gerriah* (Me.), 323.

4. Of marriage — when immoral.] A promise of marriage in consideration that the promisee should before marriage have sexual connection with the promisor is void. *Hanks v. Naglee* (Cal.), 67.

5. Subscription — "citizen."] A subscription was made on condition that a certain sum be subscribed by the citizens of B. One of the subscribers was domiciled in A., but boarded, did business and spent nearly all his time in B. *Held*, that he was a citizen of B. within the meaning of the subscription. *Union Hotel Company v. Hersee* (N. Y.), 536.

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See NEGLIGENCE, 884.

CORPORATION.

1. Discounting commercial paper ultra vires — may recover money loaned.] A corporation which has discounted commercial paper without any statutory power to do so may recover the money thus loaned, although the securities are void. *Pratt v. Short* (N. Y.), 531.
2. Real estate acquired by eminent domain — sale of, on execution.] Where a public corporation, in exercise of a delegated right of eminent domain, acquires real estate necessary for public use, such real estate can be sold on execution against the corporation, only subject to the performance of the duties and obligations of the corporation. *Goock v. McGee* (N. C.), 593.

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CRIMINAL LAW.

1. Abortion — indictment.] An indictment for abortion is bad for not negating the statutory exception of a case when advised by a physician to be necessary to save the woman's life, such exception forming part of the enacting clause, although it alleges that it was not necessary to save the woman's life, and although the statute also provides that no indictment shall be deemed invalid for want of averment of any matter not necessary to be proved. *State v. Meek* (Mo.), 427.
2. Accomplice, unsupported evidence of.] A conviction may be supported upon the uncorroborated testimony of an accomplice. *State v. Holland* (N. C.), 587.
3. Adultery — void divorce — good faith.] A decree of divorce, subsequently adjudged void, is no defense to an indictment for adultery by means of a second marriage, contracted in reliance upon the validity of the decree. *State v. Whitcomb* (Iowa), 258.
4. Assault — whipping minor servant.] A master has no implied authority to whip a minor servant hired to him by his father. *Cooper v. State* (Bart.), 704.
5. Burglary — entry — anger.] One who, intending to steal shelled corn, bores a hole through the floor of a corn-crib from the outside, and thus draws the corn into a sack below, is guilty of burglary. *Walker v. State* (Ala.), 1.

CRIMINAL LAW — *Continued.*

6. — by servant.] A servant and office boy of an attorney at law, intrusted with the key of the front door of the office, and entering at night by using the key, with intent to steal, the attorney sleeping, according to custom, in an inner room, is guilty of burglary, but not so if the boy is in the habit of sleeping in the office, to the knowledge of his employer, and enters to go to bed, and after entering forms the design to steal. *Lowder v. State* (Ala.), 9.
7. Evidence — declarations as *res gestæ*.] On a trial for murder a witness for the prosecution testified that he saw the deceased when he fell shot, from a distance of one hundred and fifty yards, immediately went to him and asked him how he shot himself, and the deceased replied, "I did not do it, I was shot from up yonder," motioning toward a neighboring mountain. *Held*, competent, as part of the *res gestæ*. But proof of the contemporaneous declaration by the deceased that he knew G. W. shot him, for he had threatened him, *held*, incompetent. *Warren v. State* (Tex. Ct. App.), 745.
8. — dying declarations of victim of abortion.] Dying declarations are admissible in evidence only when the death of the declarant is the subject of the charge, and the circumstances of the death are the subject of the declarations. So, upon an indictment for a fatal attempt to produce abortion, the dying declarations of the victim are inadmissible. *State v. Harper* (Ohio St.), 596.
9. — flight.] In a criminal case no legal presumption of guilt arises from the flight of the accused, but it is a circumstance for the consideration of the jury. *People v. Ah Ngow* (Cal.), 69.
10. — prohibition of physician's testimony.] On a trial for murder, by poison, a physician is not prohibited from testifying to the results of his examination of the deceased, and to the statements of the deceased during such examination, while attending him in his last illness. *Piereson v. People* (N. Y.), 524.
11. — rape — declarations.] On the trial of an indictment for assault with intent to commit a rape on the person of a female, who, by reason of imbecility was incompetent to be sworn as a witness, the declarations of such female, made shortly after the assault, are incompetent to prove the commission of the offense. *Hornbeck v. State* (Ohio St.), 608.
12. Former conviction.] A former conviction of assault and battery is no bar to an indictment for manslaughter, where the injuries resulted in death after the former conviction. *State v. Littlefield* (Me.), 835.
13. Game law — offering to sell birds killed in another State.] The statute punishing any one who in Massachusetts takes or kills woodcock, etc., between specified days, or buys, sells, offers for sale, or has them in possession within the same time, does not apply to such birds lawfully taken or killed in another State. *Commonwealth v. Hall* (Mass.), 387.
14. Homicide by negligence — indictment — proof.] On an indictment against

CRIMINAL LAW — *Continued.*

- a railway conductor for manslaughter, caused by his criminal negligence in misplacing a switch and omitting to notify it to an approaching train, and alleging that he knew the approach of the other train, the fact of his knowledge must be proved as laid. *Commonwealth v. Hartwell* (Mass.), 801.
15. **Insanity — delusion.]** The defense of insane delusion in a criminal case prevails only when the imaginary state of facts would justify or excuse the act if it was real. *Bossell v. State* (Ala.), 20.
16. **—.]** The doctrine of moral insanity, or irresistible impulse, co-existing with mental sanity, has no foundation in psychology nor support in law. *Id.*
17. **— evidence — burden of proof.]** There must be a preponderance of evidence of insanity in a criminal case to overcome the presumption of sanity. *Id.*
18. **Larceny — several articles at one time and place — bar.]** Larceny of several articles, belonging to several owners, by one person, at the same time and place, constitutes but one offense, and conviction or acquittal of larceny of any one of them is a bar to a prosecution for larceny of any of the rest. *Hudson v. State* (Tex. Ct. App.), 732.
19. **"Open and gross lewdness."]** The indecent exposure of his person by a man in a house to a girl eleven years old is "open and gross lewdness and lascivious behavior." *Commonwealth v. Wardell* (Mass.), 857.
20. **Rape — capacity — infant under fourteen.]** On the trial of an indictment for rape, against a boy under fourteen years of age, the burden is on the State to prove his capacity to commit rape, and a statute dispensing with proof of emission does not change the rule. *Hillbiddle v. State* (Ohio St.), 592.
21. **Riot — charivari.]** Under a statute making violent and tumultuous conduct by three or more persons a riot, persons conducting a *charivari*, or serenade with bells, horns, tin pans, guns, etc., are guilty of a riot. *State v. Brown* (Ind.), 210.
22. **Trial — instruction — "common sense."]** After instructing a jury, in a criminal case, that they are judges of the law as well as the facts, it is error to instruct them that "common sense" is their best guide, without limiting its application to the value and weight of evidence. *Wright v. State* (Ind.), 212.
23. **Withdrawal of prisoner's challenge.]** On a trial for murder the prisoner, having challenged the array, may withdraw the challenge, and thus waive the irregularity. *Pierson v. People* (N. Y.), 524.
24. **Witness — husband and wife.]** Under a statute permitting husband and wife to testify against one another on a criminal prosecution for an offense committed by one against the other, the one may testify against the other on an indictment of the other for adultery. *Roland v. State* (Tex. Ct. App.), 743.

CRIMINAL LAW — *Continued.*

28. Woman abetting attempt at rape.] A woman, aiding and abetting an attempt to commit a rape, is guilty as a principal. *State v. Jones* (N. O.), 586.

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Right to counsel.] *See* CONSTITUTIONAL LAW, 719.

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Mortgage of growing.] *See* MORTGAGE, 564.

DAMAGES.

1. Liquidated or penalty.] A contract for the sale of land provided for the payment of over \$22,000 purchase-money, by a certain day, as a precedent and essential condition, and that in case of any default in payment of the price, the vendor might declare the contract null and void, and retain any sums of money paid, and might sue and recover from the purchaser the whole or any part of the price that might be due and unpaid, as liquidated damages. Nothing was paid, and the vendor did not part with possession. In an action on the agreement to recover the entire price as liquidated damages, *held*, that a demurrer was properly sustained to the declaration. *Seofield v. Tompkins* (Ill.), 160.

2. Measure of — warranty.] The defendants, manufacturers of carriage springs, sold to the plaintiffs, manufacturers of carriages, carriage springs to be used by the plaintiffs in carriages to be manufactured by them, and warranted them. Some of the springs being placed in the carriages and proving defective, *held*, that the defendants were liable to the plaintiffs for the expense of renewing them and applying them. *Thoms v. Dingley* (Me.), 810.

See CIVIL DAMAGE ACT, 598; CONTRACT, 471; PROXIMATE AND REMOTE CAUSE, 644.

DECLARATIONS.

See EVIDENCE, 776; GIFT, 385.

DEED.

1. Delivery — presumption from recording.] The mere act of recording a deed, when done by the grantor, is but *prima facie* evidence of delivery to the grantee, liable to be rebutted, and it is successfully rebutted when it is shown that the deed was not in the nature of a family settlement, or of gift to a minor, but was a deed of trust, intended to confer no benefit on the grantee, and its execution and record are wholly unknown to him until after the death of the grantor. *Union Mutual Insurance Company v. Campbell* (Ill.), 166.

2. Execution by attorney — what sufficient.] A deed was drawn as follows:

DEED — *Continued.*

"I, H., for myself, and as attorney for T. and T., by their letters of attorney under their hands and seals, in consideration of \$—, to us paid by L., do sell and convey to L. * * * And we, the said T. and T., do covenant with said L. * * * In witness whereof I, H., in my own right, have hereunto set my hand and seal, and as attorney for said T. and T., have hereunto set their hands and seals." The names of H. and of T. and T. by H., their attorney in fact, were subscribed with seals severally affixed to all the names. *Held*, well executed. *McClure v. Herring* (Mo.), 404.

3. *Reservation of timber — Limitation of time of entry.*] In a deed reserving the right to cut and remove timber, "at any and all times, also the right of ingress and egress at any and all times for the space of twelve years from the date above written, for the purpose so as aforesaid," the right of entry and of property ceases with the twelve years. *Saltzstall v. Little* (Penn. St.), 683.

See INFANCY, 318.

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See BAIL, 437; BANKRUPTCY, 262; SURETY, 45, 553.

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See CORPORATION, 558.

ESTOPPEL.

See AGENCY, 458, 488; HOMESTEAD, 470; INFANCY, 818.

EVIDENCE.

1. **Declarations of patient to physician.]** In an action of assault and battery, the attending physician of the plaintiff may testify as to the plaintiff's complaints and statement of symptoms made to him for the purpose of medical treatment and advice, and also as to his own observation of his indications of suffering. *Fay v. Harlan* (Mass.), 871.
2. **Handwriting — writings made pending trial for evidence.]** On the question of the genuineness of a writing alleged to be in the defendant's hand, the court may exclude another writing made by him during the trial, for the purpose of evidence, and offered by him for comparison. *Commonwealth v. Allen* (Mass.), 356.
3. — **expert opinion.]** An expert, who has no knowledge of a handwriting in dispute, except from having seen the alleged penman write several times, and that only for the purpose of testifying, is incompetent to give an opinion thereof. *Reese v. Reese* (Penn. St.), 684.
4. **Impeachment of witness — form of questions.]** It seems that in impeaching the character of a witness for truth by proof of his general reputation, if the impeaching witness states that his reputation is bad, the proper inquiry is whether in view of his reputation he is worthy of belief on oath, and not whether the impeaching witness would believe him. *Holbert v. State* (Tex. Ct. App.), 738.
5. —.] The question cannot be raised for the first time on the argument or charge. *Id.*
6. — **witness' mental capacity.** Evidence is competent to show that the mind and memory of a witness have become impaired by disease and are in a feeble condition. *Alleman v. Stepp* (Iowa), 288.
7. **Letter-press copies.]** Letter-press copies of private writings are not admissible as original evidence. *Delany v. Errickson* (Neb.), 487.
8. **Memorandum.]** A witness may refresh his memory by examining a memorandum made by himself, or known and recognized by him as stating the facts truly, when, after such examination, he can testify to the facts as matter of independent recollection; but the memorandum itself is not thereby made evidence. If the memory of the witness is not refreshed by an examination of the memorandum, so that he can testify to the facts as matter of independent recollection, but he can nevertheless testify, that at or about the time the memorandum was made, he knew its contents, and he knew them to be true, his testimony and the memorandum are both competent evidence; but if he did not know the contents of the memorandum to be true when it was made, although he saw it made, the memo-

EVIDENCE — *Continued.*

- random is not admissible evidence. *Acklen's Executor v. Dickman* (Ala.), 54.
9. Opinions of experts as to quality.] In an action involving a breach of warranty that a cotton-gin was "equal in all respects to the best saw-gin then in use," the opinions of competent and experienced men are admissible on the question whether the cotton-gin was as warranted. *Scattergood v. Wood* (N. Y.), 515.
10. *Res gestæ*—declarations.] In an action for a negligent injury to plaintiff's minor son by a pistol wound, the son's declaration, made after the wound was dressed, that the defendant was not to blame, is inadmissible as evidence in chief. *Mutch v. Pierce* (Wis.), 776.
- Burden of proof of insanity.] *See* CRIMINAL LAW, 80.
- Of accomplices.] *See* CRIMINAL LAW, 587.
- To contradict bill of lading.] *See* CARRIER, 337.
- Flight.] *See* CRIMINAL LAW, 69.
- See* CIVIL DAMAGE ACT, 598; CRIMINAL LAW, 534, 596, 606, 745; GIFT, 388; NEGOTIABLE INSTRUMENT, 604, 651; SEDUCTION, 233 • WITNESS, 4, 63.

EXECUTION.

See EXEMPTION, 261, 466.

EXEMPTION.

1. From execution — waived by lien in lease.] A provision in a lease that the rent charge shall be a lien on the crops and stock on the leasehold, "whether exempt from execution or not," is valid as a mortgage of the exempt property. *Fejaary v. Brosch* (Iowa), 261.
2. Head of family — widow, when.] A widow remained upon her husband's farm and carried it on for eleven years after his death, as her only means of support. Her children were married and had left her. She rented the farm and stock, reserving and occupying for herself one room in the house. *Held*, that she was entitled to the benefit of the exemption law, as the head of a family engaged in agriculture. *Collier v. Lattimer* (Bart.), 711.
3. — wife of absconding husband.] Where a husband absconds, and his wife continues to carry on his farm, she becomes the head of the family and may maintain his claim to property exempt from execution. *Fraser v. Syas* (Neb.), 466.

See CARRIER, 370; TAXATION, 333.

EXPERT.

See EVIDENCE, 634.

EXPRESS COMPANY.

See CARRIER, 107.

FIDUCIARY DEBT.

See BANKRUPTCY, 363.

FINDER.

See LOST PROPERTY, 664.

FISHERY.

See CONSTITUTIONAL LAW, 632.

FIXTURES.

Vendor and purchaser—chattel mortgage.] Where one enters into possession of land, under a contract for future purchase, paying no rent, and erects substantial buildings and machinery for the prosecution of his business, and fails to fulfill the contract and acquire the title, the erections are realty, and cannot be brought within a chattel mortgage of them by the vendee. *Dinkley and Egory Iron Company v. Black (Me.)*, 346.

FORMER CONVICTION.

See CRIMINAL LAW, 335.

FORWARDER.

See CARRIER, 814.

FRAUD.

1. **Sale—artifice—evasive answer.]** Where, on the sale of a horse known by seller to be unsound in a certain respect the seller conceals the defect, and gives evasive and artful answers to inquiries, with the intent to deceive, and thereby deceives and injures the purchaser, the latter may rescind. *Croyle v. Moss (Penn. St.)*, 654.
2. **Voluntary conveyance by woman pending marriage treaty.]** A secret conveyance by a woman of her property to an insolvent for an inadequate consideration, pending negotiations for her marriage and three days before marriage, is fraudulent as to the husband. *Hall v. Carmichael (Bart.)*, 606.
3. **When recipient of moneys fraudulently obtained not answerable.]** A member of a municipal board received moneys belonging to it, as its attorney, and appropriated them to his own use; subsequently he procured moneys from the plaintiff on a forged mortgage, and with them paid his debt to the board, which received the same in good faith and in ignorance of the fraud upon the plaintiff. *Held*, that the plaintiff could not recover the same from the board. *Stephens v. Board of Education of City of Brooklyn (N. Y.)*, 511.

See STATUTE OF FRAUDS, 782.

GAMBLING.

See CONSTITUTIONAL LAW, 420.

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GAME LAWS.

See CRIMINAL LAW, 287.

GARNISHMENT.

See MUNICIPAL CORPORATION, 785.

GIFT.

1. *Declarations of donor—destroying notes.*] One who held her grandson's promissory notes destroyed them, stating that she did not expect to live long, and in case of her death did not desire that he should be compelled to pay them. On her death, *held* a complete and valid gift *causa mortis*. *Darland v. Taylor* (Iowa), 285.
2. *Savings bank deposit.*] D. deposited in a savings bank in his own name all he was permitted under the rules, and then made three other deposits as trustee, one for his only son, the others for his grandchildren, taking separate bank books, which he never delivered, but which were found among his effects on his death. He received the dividends during his life. The rules provided that he must produce the books to receive dividends, in order that they might be entered and that any depositor might designate the person for whose benefit he made deposit, which should bind his legal representatives. The son and grandchildren offered to prove that he had told each of them that he had made and intended the deposits for them after his death, but he wanted to draw the interest during his life. *Held*, competent, and to justify a finding of a complete and effectual trust. *Gerrish v. New Bedford Institution for Savings* (Mass.), 865.

GOVERNOR.

See MANDAMUS, 713.

GUARANTY.

When notice of acceptance and default requisite.] In case of a collateral guaranty of a debt to be created, of an amount uncertain, variable and unascertainable at the time, the guarantor is not liable without notice of acceptance within a reasonable time, nor without notice of the principal's default. *Mulroy v. Quinn* (Ind.), 227.

See STATUTE OF FRAUDS, 732.

HANDWRITING.

See EVIDENCE, 356, 634.

HOLIDAY.

See JURISDICTION, 736.

HOMESTEAD.

Mortgage—assumption of—estoppel.] A homestead may be mortgaged,

HOMESTEAD — *Continued.*

and one who purchases the premises subject to and agreeing to pay such mortgage cannot avoid it. *Skinner v. Reynick* (Neb.), 479.

See EXEMPTION.

HUSBAND AND WIFE.

See CRIMINAL LAW, 743; MARRIAGE.

IMPEACHMENT.

Of witness.] *See EVIDENCE, 291, 788.*

INDICTMENT.

See CRIMINAL LAW, 391, 427.

INFANCY.

1. *Deed — avoidance — estoppel.*] A minor's deed of lands is binding upon him, if after arriving at majority, he knowingly suffers the grantee to make valuable improvements on the premises, without announcing his intention to avoid the deed. *Davis v. Dudley; Shaw v. Dudley; Dudley v. Shaw* (Me.), 818.

2. *Emancipation.*] An insolvent father may emancipate his minor child, even as against his creditors, and although the child remains at home and is hired by the father. *Wilson v. McMillan* (Ga.), 115.

3. *Necessaries — money for professional education — ratification.*] An infant may avoid his bond for money loaned him by his father's administrator to enable him to acquire a professional education, and his mere acknowledgment of the debt after majority, without an express promise to pay, is not a ratification. *Turner v. Gaither* (N. C.), 574.

See CRIMINAL LAW, 592.

INSANITY.

See CRIMINAL LAW, 20; INSURANCE, 410; WIDOW, 664.

INSURANCE.

FIRE.

1. *Compromise after loss.*] The agreement by a fire insurance company to pay a certain sum in compromise of a claim for loss, when made after an opportunity to investigate, and without fraud or deception on the part of the insured, cannot be defeated by proof of a subsequently discovered breach of warranty of the policy. *Stache v. St. Paul Fire and Marine Insurance Company* (Wis.), 772.

2. *Condition against subsequent — subsequent voidable insurance.*] A condition in a fire policy against subsequent insurance is not broken by the taking of a subsequent policy valid on its face, but voidable for breach of condition, although such subsequent policy was paid. *Fireman's Insurance Company of Dayton v. Holt* (Ohio St.), 6C1.

INSURANCE—*Continued.*

3. Innocent representation of amount of incumbrance.] A policy of fire insurance was conditioned to be void in case of any false representation of the condition or occupancy of the property material to the risk. In the application it was asked: "Is the property incumbered? If so, state to what amount, and the value of the premises." This was answered: "Yes, mortgage \$3,000—\$10,000." The mortgage made by the insured was for \$3,200, and \$240 accrued interest was also due on it. The policy made the application part of the contract. *Held*, that the policy was avoided. *Byers v. Farmers' Insurance Company* (Ohio St.), 623.
4. Sale or transfer of title—mortgage.] A mortgage is not a sale or transfer of title within the prohibition of an insurance policy. *Id.*
5. Statement of interest and ownership—mortgage.] A fire policy was conditioned to be void upon a decree of foreclosure, or in case the interest of the insured was not truly stated, or was any other than the entire, unconditional and sole ownership of the property. The property was subject to an existing and undisclosed mortgage and a lease for years. *Held*, no breach. *Dolliver v. St. Joseph Fire and Marine Insurance Company* (Mass.), 373.
6. Total loss of building.] In case of fire insurance upon a building, if the building loses its identity and specific character by fire, although a large part of the walls and some of the iron attached thereto are left standing, it is a "total destruction" within the meaning of the policy. *Williams v. Hartford Insurance Company* (Cal.), 77.
7. Vacancy—removal of tenant—good faith.] A fire policy was conditioned to be void if the premises should become vacant or cease to be occupied. The proofs of loss showed a vacancy by the tenant a few days before loss. *Held*, that evidence that the vacancy occurred without the knowledge of the insured, and that on learning it he at once endeavored to procure another tenant, and notified the company, is immaterial. *McClure v. Watertown Fire Insurance Company of New York* (Penn. St.), 650.

LIFE.

8. Warranty against overvaluation—false swearing.] An insurance warranty against overvaluation is broken only in case of an intentional overvaluation; and a provision that fraud or false swearing shall work a forfeiture means intentional false swearing. *Helbing v. Sees Insurance Company* (Cal.), 72.
9. Payment of premiums—custom to receive on days not provided—waiver.] A life insurance company, accustomed to accept premiums on a particular policy on days later than that fixed by the policy for the payment thereby, waives any forfeiture provided by the policy for non-payment on the specified day, and is bound although the insured was fatally sick at the last payment, and the receipt for the first time contained the words, "policy.

INSURANCE — *Continued.*

- holder in good health," and the company did not know of the sickness. *Cotton States Life Insurance Company v. Lester* (Ga.), 122.
10. **Covenant against futuro pernicious habit.]** In an application for a life insurance policy the applicant declared "that he does not now nor will he practice any pernicious habit that obviously tends to the shortening of life." The policy contained a condition "that if any of the statements or declarations made in the application shall be found in any respect untrue, the policy shall be void." At the time of the application applicant's habits were correct and temperate; afterward he took to excessive drinking, whereof he died. *Held*, that the policy was not avoided. *Kascht v. Mutual Life Insurance Company* (Penn. St.), 641.
11. **Suicide — sane or insane.]** A policy of life insurance provided that in case of the death of the insured "by his own act or intention, whether sane or insane," the company should only be liable for the net value of the policy at that time. *Held*, that this provision embraced an intentional self-destruction by an insane man, provided he was conscious at the time of the physical nature and consequences of his act, and intended to destroy his life, although he was not conscious of the moral quality or consequences of the act. *Adkins v. Columbia Life Insurance Company* (Mo.), 410.
12. **Marine — carelessness of insured.]** A marine insurance is not defeated by the mere fact the loss might have been avoided by the exercise of proper care on the part of those in charge of the vessel at the time. *Enterprise Insurance Company v. Patriot* (Ohio St.), 590.

INTEREST.

See JURISDICTION, 110; LIMITATION OF ACTION, 579.

JURISDICTION.

1. **Court sitting on holiday.]** In the absence of express prohibition courts may sit on legal holidays. *Dunlap v. State* (Tex. Ct. App.), 286.
2. **Limit of amount — interest.]** A court having jurisdiction only of actions where the amount in controversy does not exceed \$800, has no jurisdiction of an action on a note for \$800 and interest, alleged to be wholly due. *Wilson v. Sparkman* (Fla.), 110.

See MARRIAGE, 556.

JUROR.

See CONSTITUTIONAL LAW, 796.

JURY.

Not judges of law in criminal cases.] *See* CONSTITUTIONAL LAW, 8.

LANDLORD AND TENANT.

1. **Lease — covenant for renewal — when not binding on lessee.]** In a lease

LANDLORD AND TENANT — *Continued.*

formally and technically drawn, with an evident attention to details, and containing various covenants, some mutual and others binding only the one party or the other, there was a covenant on the part of the lessor for a new lease at the expiration of the term, but no corresponding covenant on the part of the lessee to accept it. *Held*, that the lessee was not bound to accept it. *Bruce v. Fulton National Bank* (N. Y.), 505.

2. Tenant attempting to purchase landlord's title.] A tenant in possession cannot acquire title adverse to his absent landlord by purchase at a judicial sale. *Lausman v. Drahes* (Neb.), 468.
3. Under-lease — assignment.] Where a lessee leases a part of the premises to another, for the remainder of his term, with easements in the other part, this is an under-lease, and not an assignment. *McNeil v. Kendall* (Mass.), 373.

LARCENY.

Of paraphernalia.] *See* MARRIAGE, 617.

See CRIMINAL LAW, 783.

LEASE.

Idem in.] *See* EXEMPTION, 261.

See LANDLORD AND TENANT, 505; STATUTE OF FRAUDS, 173.

LEWDNESS.

See CRIMINAL LAW, 357.

LIEN.

See CARRIER, 360.

LIMITATION OF ACTION.

1. Acknowledgment to revive.] A demand is not taken out of the operation of the statute of limitations by a written acknowledgment found among the debtor's papers after his death. *Allen v. Collins* (Mo.), 416.
2. Mutual accounts.] Upon a store account the defendant had delivered to the plaintiff small quantities of merchandise at different times. *Held*, a case of "mutual accounts," or "reciprocal demands," to which the statute of limitations did not apply. *Green v. Disbrow* (N. Y.), 496.
3. Payment of interest by principal — effect on surety.] Payment of interest on a note by the principal maker, before the statute of limitations has run against it, takes the note out of the operation of the statute as to a surety upon the note. *Green v. Greensboro Female College* (N. C.), 579.
4. Statute of, as to mortgage, when not bar.] A suit in equity to foreclose a mortgage can be maintained, notwithstanding an action at law upon the accompanying note is barred by the statute of limitations. *Browne v. Browne* (Fla.), 96.

See DEED, 683.

LOST PROPERTY.

Right of finder.] A servant in a hotel found a roll of bank notes in the public parlor, and informed her master, who suggested that it belonged to a transient guest, and received the money from her to give to him. It proved not to belong to the guest, and the servant demanded it from the master, who refused to return it. *Held*, that she could recover it from him. *Hamaker v. Blanchard* (Penn. St.), 664.

MALPRACTICE.

See NEGLIGENCE, 363.

MANDAMUS.

Governor.] Mandamus will not lie against the governor. *Jonesboro, etc., Turnpike Co. v. Brown* (Bart.), 713.

MARRIAGE.

1. **Charge of wife of separate estate as surety by note.]** A married woman having a separate estate may charge the same in equity by the execution of a promissory note as surety for her husband or another, without express words of charge. *Williams v. Urmston* (Ohio St.), 611.
2. **Jurisdiction—married woman's acceptance of service of process.]** Jurisdiction of the person of a married woman is acquired by her written admission of service of the summons. *Nicholson v. Cox* (N. C.), 556.
3. **Paraphernalia.]** Necessary and suitable clothing furnished by a husband to his wife, or purchased by her with money or means given to her by her husband for that purpose, does not become her separate property within the meaning of the statute concerning the rights and liabilities of married women. *Pratt v. State* (Ohio St.), 617.
4. **— larceny of.]** But such articles purchased by a wife with her separate money or means are made her separate property by that statute, and a conviction for the larceny of such goods under an indictment laying the property in the husband [cannot be sustained, although the goods were stolen from the family residence. *Id.*

Contract of, when immoral.] *See* CONTRACT, 67.

Restraint of.] *See* WILL, 240.

MARRIED WOMAN.

See MARRIAGE.

MASTER AND SERVANT.

1. **Liability of master for servant's criminal trespass.]** An armed watchman, employed by the owners of a brewery to guard their property and preserve the peace, pursued a person acting on the premises in a drunken and disorderly manner, and while he was retreating, killed him. *Held*, that the employers were not liable. *Golden v. Newbrand* (Iowa), 257.

MASTER AND SERVANT— *Continued.*

2. *Negligence— of co-servant.*] A master is not liable to his servant for injury resulting from the negligence of a fellow-servant in the same general employment, although the servants are not engaged in the same kind of work, and the negligent servant is superior in grade, and the servant injured was bound to obey his orders, unless the negligent servant was incompetent, and the master knew, or in the exercise of due diligence should have known, of his incompetency; and competency is presumed to continue until notice of change. *Blake v. Maine Central Railroad Company (Me.)*, 297.
3. — *injury by railway company to servant of telegraph company.*] The plaintiff, while engaged in the employ of a telegraph company in distributing poles along the line of a railway, and while upon a train on such railway, was injured by the negligence of the railway company's engineer upon the train. The train, in pursuance of a contract between the companies, was transporting men and materials of the telegraph company. The train was manned by employees of the railway company, but was temporarily under the direction of the foreman of the telegraph company. *Held*, that the plaintiff could recover of the railway company. *Coggin v. Central Railroad Company (Ga.)*, 132.
4. — *action by servant— contributory negligence.*] An employee in a coal mine left the room where he was at work, and went to another, according to custom, to visit some other employees there at work, and while there the roof fell in, by reason of the decay and insufficiency of the supports, and killed him. *Held*, that no action could be maintained against the employer therefor. *Wright v. Rawson (Iowa)*, 273.
5. *Responsibility of master for illegal act of servant forbidden by him.*] A master is civilly liable to a statutory penalty for an illegal sale of intoxicating liquor made by his servant, without his knowledge or consent, and against his instruction. *George v. Gobeys (Mass.)*, 376.
6. *When relation not created.*] Where a servant engaged in a temporary work for another, on the false representation that the master had directed it, he does not become the servant of that other so as to be remediless for an injury by the negligence of the latter's servant. *Kelly v. Johnson (Mass.)*, 398.

See CRIMINAL LAW, 704.

MEASURE OF DAMAGES.

See DAMAGES.

MEMORANDUM.

See EVIDENCE, 54.

MERGER.

See BANKRUPTCY, 263.

MORTGAGE.

Of growing crop.] A mortgage of a growing crop is valid. *Cotton v. Willoughby* (N. C.), 564.

See HOMESTEAD, 479; INSURANCE, 878, 633.

MUNICIPAL BONDS.

See NEGOTIABLE INSTRUMENTS, 57.

MUNICIPAL CORPORATION.

1. **Garnishment.]** A municipal corporation is not subject to garnishment for a debt to a citizen. *Merrell v. Campbell* (Wis.), 785.
2. **Negligence—exhibition of animals in street—license.]** A city licensed an exhibition of wild animals, without specifying any place. The owner exhibited them in a public street, whereby the plaintiff's wife sustained a personal injury. *Held*, that the city was not liable. *Little v. City of Madison* (Wis.), 793.
3. **— injury in erection of court-house.]** An action will not lie against a county for a personal injury sustained through the negligence of its employees in the erection of a court-house. *Hollenbeck v. Winnebago County* (Ill.), 151.
4. **— surface water.]** A municipal corporation has no right to confine a small, natural stream with a box drain, allow the same to become obstructed, and so turn surface water into it that the stream is swelled beyond its natural capacity, and overflows and injures the land of an adjoining proprietor. *Noonan v. City of Albany* (N. Y.), 540.
5. **Not liable for necessary and careful blasting in street.]** A city, authorized to build sewers in its streets, is not liable for damage done by necessary blasting of rocks in the work, unless negligently done by its agents. *Murphy v. Lowell* (Mass.), 381.
6. **Ordinance—"projections" in streets—door-steps.]** A city has no power by ordinance to prohibit door-steps lawfully established in a street, under an authority to "make such rules and regulations for the erection and maintenance of balustrades and other projections upon the roofs or sides of buildings as the safety of the public requires," and to make "all salutary and needful by-laws." *Cushing v. City of Boston* (Mass.), 383.
7. **Power to offer reward.]** In the absence of express authority a city has no power to offer a reward for the detection of a criminal. *Hanger v. City of Des Moines* (Iowa), 266.
8. **Liability for riot.]** Under a statute making a county liable for property "situated therein" when destroyed by a mob, provided, upon knowledge of the destructive intention, notice was given by the owner to certain public authorities, and he himself was guilty of no improper conduct, causing the destruction, *held*, that the liability attached for property owned by a non-resident of the State, in transit in the possession of a common carrier; that notice by the owner to the authorities was not required except where

MUNICIPAL CORPORATION — *Continued.*

he had knowledge of the intention, nor when the authorities themselves knew the intention; and that the county was not absolved although it was beyond its power to put down the riot, and although the State military was called out to suppress it, and fired upon the mob before the destruction of the property. *County of Allegheny v. Gibson* (Penn. St.), 670.

9. **Streets — liability for injury by "coasting."** A city is not liable for an injury done to a person on a public street by a collision with others sliding down hill thereon without any actual license from the city, as for "insufficiency or want of repair;" nor is it liable for not suppressing such a practice, that being a police duty. *Schultz v. City of Milwaukee* (Wis.), 779.
10. **Unreasonable ordinance — sale of spirituous liquors.** A town ordinance prohibiting licensed retailers of spirituous liquors from selling such liquors between 6 o'clock, P. M. and 6 o'clock, A. M., is unreasonable and invalid. *Ward v. Mayor and Aldermen of Greenville* (Balt.), 700.

NATIONAL BANK.

See TROVER, 137.

NECESSARIES.

See INFANCY, 574.

NEGLIGENCE.

1. **Canal company — character of liability.** A company owning and operating a canal is not bound as a common carrier or insurer for the safely navigable state of the canal, but only for the exercise of reasonable care. *Pennsylvania Canal Company v. Burd* (Penn. St.), 659.
2. **Contributory — defect in sidewalk.** One who attempts in the dark to pass an open cellar-way in a sidewalk, knowing, but for the time forgetting its existence, is guilty of such contributory negligence as will defeat his recovery for injuries sustained by falling into it. *Braker v. Town of Covington* (Ind.), 202.
3. **Malpractice — country surgeon — degree of skill requisite.** A country physician and surgeon is not bound to the exercise of that high degree of art and skill possessed by eminent surgeons living in large cities and making a specialty of the practice of surgery, but only to that reasonable degree of learning, art and skill ordinarily possessed by others learned in his profession, having regard to the advanced state of the science. *Small v. Howard* (Mass.), 363.
4. **Warehouseman — burden of proof.** In an action against a warehouseman for the loss of goods by fire, alleged to have been occasioned by his negligence, the burden of proof is on the plaintiff to show such negligence. *Denton v. Chicago, R. I. & Pac. R. R. Co.* (Iowa), 263.

Of insured.] *See* INSURANCE, 590.

Homicide by.] *See* CRIMINAL LAW, 391.

See MUNICIPAL CORPORATION, 132, 151, 257, 297, 540, 779, 793; TRUST, 517.

NEGOTIABLE INSTRUMENT.

1. **Action on — when may be commenced.]** No action can be maintained on a negotiable promissory note until the lapse of the full third day of grace. *Benson v. Adams* (Ind.), 220.
2. **Alteration — when immaterial.]** A note was indorsed on its face, "subject to a contract made," etc. This language was changed, without authority of the maker, to "subject of contract made," etc. Held, immaterial, because the note was not negotiable. *Cushing v. Field* (Me.), 293.
3. **— insertion of place of payment.]** The authorized insertion of a place of payment in a promissory note made payable generally is a material alteration that avoids the note as to an indorser. *Townsend v. Star Wagon Co.* (Neb.), 493.
4. **Check — notice of dishonor — withdrawal of funds.]** Notice of dishonor to the drawer of a check is unnecessary if he had no funds with the drawee at the time of drawing, or withdrew them afterward before presentment, although the presentment was not prompt. *Fletcher v. Pierson* (Ind.), 214.
5. **— action on unaccepted, against drawee.]** No action can be maintained on an unaccepted check against the drawee. *Nat. Bank of Rockville v. Second Nat. Bank of Lafayette* (Ind.), 236.
6. **Draft — not assignment of general fund.]** A draft on a general fund in the drawer's hands, not accepted, is not an assignment of the fund. *First Nat. Bank of Canton v. Dubuque South-western Ry. Co.* (Iowa), 280.
7. **Evidence — contemporary agreement that indorser should not be liable.]** In an action by holder against indorser of a check, evidence is competent, not only that the defendant indorsed upon the express agreement of the holder that he should not be liable, but of all the circumstances under which the indorsement was made, and that it was at the request and for the mere accommodation of the holder. *Breneman v. Furniss* (Penn. St.), 651.
8. **— of waiver of demand and notice.]** As between indorser and his immediate indorsee, oral evidence is competent to prove waiver of demand and notice of non-payment at the time of indorsing in blank. *Dye v. Scott* (Ohio St.), 604.
9. **—.]** Waiver of demand waives notice of non-payment. *Id.*
10. **Indorser secured by pledge — notice.]** An indorser, fully secured by money expressly pledged and appropriated for the payment of the note, is not entitled to notice of non-payment. *Wright v. Andrews* (Me.), 306.
11. **Municipal bonds, when are not.]** Authorized municipal bonds, payable to bearer, on the completion of a specified railroad, are not negotiable paper. *Blackman v. Lehman* (Ala.), 57.
12. **Notice of protest by mail.]** An indorser living outside the place of dishonor, but nearer to the post-office in such place than any other, and obtaining his mail matter there, yet having no regular or usual place of busi-

NEGOTIABLE INSTRUMENT — *Continued.*

- ness therein, cannot be held by notice of dishonor deposited in such post-office. *Forbes v. Omaha National Bank* (Neb.), 480.
13. Place of contract.] A note dated in one State and signed by one maker there, but signed by other makers and delivered in another State, is a contract of the latter State. *Hart v. Wills* (Iowa), 255.
14. Receiver's certificates.] Certificates of indebtedness issued by a receiver are not negotiable instruments. *Turner v. Peoria and Springfield Railroad Company* (Ill.), 144.
15. Transfer for antecedent debt.] A note of a third person, transferred as security for an antecedent debt, the transferee giving up nothing and incurring no fresh liability, is subject to equities as between the transferee and the maker. *Craighead v. Wells* (Bart.), 685.

See PARTNERSHIP, 89.

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Surety — discharge by indulgence of principal for usurious consideration, 639.
Trust — for charity — certainty of object, 555.
Water — surface, concentration and discharge of, 426.
Witness — competency — religious belief, 7.
 — impeachment of mental capacity, 291.
 — husband and wife in criminal case, 748.

NOTICE.

- Of dishonor.]** See NEGOTIABLE INSTRUMENT, 314.
 See GUARANTY, 227.

NOTICE OF NON-PAYMENT.

- When excused.]** See NEGOTIABLE INSTRUMENT, 308.

NOTICE OF PROTEST.

- Served by mail.]** See NEGOTIABLE INSTRUMENT, 490.

OFFICE AND OFFICER.

1. **Liability of county treasurer for trust moneys stolen.]** A county treasurer is liable on his official bond for trust moneys stolen from the safe provided by the county, without any want of care on his part. *Com'rs of Jefferson County v. Lineberger* (Mont.), 462.
2. **School district treasurer — liability for money lost by failure of depository.]** A school district treasurer deposited school money in a bank to his own individual credit, directing that bank to pay out of it certain school district bonds about maturing, payable at that bank. The bank failed and the money was lost. *Held*, that the treasurer was liable for it in an action on his bond. *Ward v. School District* (Neb.), 477.

OPINIONS.

See EVIDENCE.

ORDINANCE.

See MUNICIPAL CORPORATION, 383, 700.

PARAPHERNALIA.

See MARRIAGE, 617.

PARTNERSHIP.

1. **Dissolution — use of name on signs.]** On the dissolution of the firm of M. & S., S. bought M.'s interest in certain of the firm property, and assumed the rent of the old stand, where he continued the business, while M. opened an office for the same business in another part of the city, as it was understood he was to do. M. removed his name from the old firm sign, but S. replaced it, placing over it "S. successor to," in small and almost imperceptible letters. *Held*, that S. should be restrained from such use of M.'s name. *Morgan v. Schuyler* (N. Y.), 543.
2. **Non-commercial — negotiable instrument.]** Attorneys-at-law, who were partners in the practice of their profession, have no authority to bind the firm by becoming parties to negotiable instruments, unless such authority is given by the terms of partnership, or expressly given or recognized by both, or may be implied from the general habits of the partners in their business transactions. *Friend v. Duryee* (Fla.), 89.
3. **Payment of individual debt out of partnership fund.]** Where one partner pays his individual debt, to the knowledge of his creditors, out of the funds of his insolvent firm, without the assent of his copartners, the money may be attached by a creditor of the firm. *Johnson v. Hersey* (Me.), 303.

PARTY-WALL.

Destruction by fire — contribution.] In case a party-wall is destroyed by fire, there is no implied obligation to contribute toward rebuilding it. *Antemarchi's Exr. v. Russell* (Ala.), 40.

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PASSENGER.

See CARRIER.

PHYSICIAN.

Declarations of patient to.] *See* EVIDENCE, 372, 517.

PRINCIPAL AND SURETY.

See SURETY.

PROMISSORY NOTE.

See NEGOTIABLE INSTRUMENT, 290.

PROXIMATE AND REMOTE CAUSE.

Communication of fire.] A railway locomotive engine emitted sparks to land adjoining the plaintiff's where they ignited leaves, briars, brush, stumps, and logs, and the fire was continuously conducted by the same, in about two hours, to a pile of lumber on the plaintiff's land, three hundred feet distant, which it consumed. The weather was dry, and the wind was high in that direction. There was some evidence of another origin. *Held*, that it was a question of fact whether the defendant's negligence was the proximate cause of injury. *Lehigh Valley R. R. Co. v. McKee* (Penn. St.), 644.

PUBLIC POLICY.

See ATTORNEY, 267.

RAPE.

See CRIMINAL LAW, 586, 592, 608.

RATIFICATION.

See INFANCY, 574.

RECEIVER.

Certificates of.] *See* NEGOTIABLE INSTRUMENT, 144.

See COMMITTEE, 716.

RECORDING.

See DEED, 166.

REGISTRY.

Of voters.] *See* CONSTITUTIONAL LAW, 786.

REMOVAL OF CAUSE.

In an action of trespass on land a non-resident defendant sued with residents may remove the cause to the Federal court so far as he is concerned. *Simmons v. Taylor* (N. C.), 566.

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REPRESENTATION.

See SALE, 662.

RESERVATION.

See DEED, 683.

RES GESTÆ.

See CRIMINAL LAW, 745 ; EVIDENCE, 778.

RESTRAINT OF TRADE.

See ATTORNEY, 267.

REWARD.

See MUNICIPAL CORPORATION, 266.

RIOT.

See CRIMINAL LAW, 210 ; MUNICIPAL CORPORATION, 670.

SALE.

1. Representation of value — when a warranty.] In a sale of a drug establishment, if the purchaser has no knowledge of the business and relies on the seller's statement as to the value, and the seller knows of such reliance, and those statements are false, to the purchaser's injury, although the seller believed them true, the purchaser may be relieved. *Bower v. Fenn* (Penn. St.), 662.
2. Stoppage in transit.] The seller of goods may stop them in transit on account of the purchaser's insolvency existing before, but not known to the seller until after the sale. *Loeb v. Peters* (Ala.), 17.
3. — sub-purchaser.] The right of stoppage in transit is lost if the purchaser has sold the goods and indorsed the bill of lading to a sub-purchaser for value in good faith, but the sub-purchaser's knowledge of the original insolvency bears on the question of his good faith. *Id.*
4. Transfer of bill of lading as collateral security.] The transfer of a bill of lading as mere collateral security for a pre-existing debt does not make the transferee a purchaser for value. *Id.*

See FRAUD, 654.

SCHOOLS.

1. Right of teacher to chastise pupil.] The teacher of a public school has the right moderately to chastise a pupil for refusing to render an excuse for absence from school without leave. *Danenhoffer v. State* (Ind.), 214.
2. School director — expulsion of scholar — liability for.] School directors, empowered by statute with discretionary power to suspend or expel scholars from the public schools, are not personally liable for the exercise of that power unless they act wantonly or maliciously. *McCormick v. Burt* (Ill.), 163.

SEDUCTION.

Evidence.] In an action by an unmarried woman for her own seduction it is improper to ask her on cross-examination, for the purpose of impeaching her character, if she had not had sexual intercourse with other men; but if a child had been born as the result of the alleged seduction, the inquiry is proper on the question of paternity, in order to mitigate damages. *Smith v. Faryan* (Ind.), 232.

SIDEWALK.

See NEGLIGENCE, 203.

SIGNS.

See PARTNERSHIP, 543.

STATUTE OF FRAUDS.

1. Guaranty — consideration.] An agreement indorsed on a note before negotiation to "guaranty the payment of the within note," and constituting a ground of credit to the maker, is void within the statute of frauds if it does not express the consideration. *Parry v. Spikes* (Wis.), 782.

2. Lease — rent to be settled by arbitration.] An agreement, in a written lease, for the renewal thereof, and to pay as rent for such renewal term, a certain percentage upon the cash value of the premises, to be fixed by appraisers, is not within the statute of frauds. *Norton v. Gale* (Ill.), 173.

See ATTORNEY, 267.

STOCK.

See ACTION, 80.

STOPPAGE IN TRANSIT.

See SALE, 17.

STREET.

See MUNICIPAL CORPORATION, 381, 779, 793.

SUBSCRIPTION.

See CONTRACT, 536.

SUICIDE.

See INSURANCE, 410.

SUNDAY.

1. Criminal inquiry on — bail on.] In a time of peace and order it is illegal to hold a court of criminal inquiry on Sunday, but bail may lawfully be taken on that day. *Weldon v. Colquitt* (Ga.), 128.

2. Injury by assault of dog while travelling.] One whose property is injured by the assault of a dog is not defeated in his action of damages against

SUNDAY — *Continued.*

- the owner by the fact that the plaintiff was unlawfully travelling on Sunday at the time. *White v. Lang* (Mass.), 402.
3. Pursuing avocation on — selling cigars at hotel.] An innkeeper sold cigars on Sunday from a stand which was a part of his establishment. *Held*, that he was not punishable under the statute for engaging in common labor and his usual avocation. *Career v. State* (Ind.), 205.
4. Travel on — what is.] One who is injured by a defect in a highway, on his return from a funeral, on Sunday, having diverged from his ordinary route to make a social call, is remediless. *Davis v. Somerville* (Mass.), 390.

SURETY.

1. Discharge by conduct of creditor.] A life insurance company, holding the note of a deceased policy-holder, for money loaned, and knowing that his estate was insolvent, and that the note was signed by a surety, paid the money due on the policy to his personal representative, to whom it was payable by the terms of the policy, although the latter offered to deduct the amount due on the note, or to receive the note in part payment. *Held*, that the surety was thereby discharged. *White's Administrator v. Life Association of America* (Ala.), 45.
2. On bond not signed by principal.] A surety is not bound by any official bond conditioned to be, but not signed by the principal. *Bunn v. Jetmore* (Mo.), 425.
3. On official bond signed and delivered in blank.] One who as surety signs and delivers an official bond with blanks as to the name and term of office, the penal sum, date, names of other sureties, and the like, impliedly consents that such blanks may be subsequently filled by the principal, and the obligee's knowledge that the bond was thus delivered does not prevent his recovery upon it, although the penal sum inserted was greater than that limited by the oral agreement of the surety and principal. *City of Chicago v. Gage* (Ill.), 182.
4. Effect of not filing in specified time.] A statutory provision that an official bond shall be filed within a specified time or the officer shall be deemed to have refused the office, and the same shall be filled by appointment, is merely directory. *Id.*
5. Entries of principal as against surety.] Where a financial officer is his own successor, his entries of balances in his hands at the expiration of his first term, made in pursuance of legal requirement, are conclusive on himself and his sureties on his bond for the new term. *Id.*
6. Indulgence by creditor to principal — usurious consideration.] An indorser is not discharged by an agreement of indulgence by the creditor to the principal debtor founded upon a usurious consideration paid in advance, and reserving his rights and remedies against the indorser. *First National Bank of Charlotte v. Lineberger* (N. C.), 583.

See LIMITATION OF ACTION, 579.

SURFACE WATER.

See MUNICIPAL CORPORATION, 540; WATER AND WATER-COURSE, 481.

TAXATION.

License tax on lawyers.] The legislature has the power to levy a license or occupational tax upon lawyers. *Young v. Thomas* (Fla.), 93.

See CONSTITUTIONAL LAW, 223.

TENANT.

See LANDLORD AND TENANT, 468.

TENDER.

See CONTRACT, 272.

TIMBER.

Reservation of.] *See* DEED, 683.

See TRESPASS, 796.

TRADE-MARK.

Deceptive title—INFRINGEMENT.] If there is any right of trade-mark in the words "East Indian" in connection with "remedy," on bottles of medicine, the false adoption of those words to indicate that the medicine is used in the East Indies will defeat an action for infringement. *Connell v. Reed* (Mass.), 397.

TRANSFER.

See NEGOTIABLE INSTRUMENT, 685.

TREASURER.

County.] *See* OFFICE AND OFFICER, 462.

School district.] *See* OFFICE AND OFFICER, 477.

TRESPASS.

Sale and removal of timber wrongfully cut.] Where one wrongfully cuts timber on the lands of another and sells it to an innocent purchaser, the entry upon the lands and removal of the timber by such purchaser is trespass. *Hasleton v. Week* (Wis.), 796.

TROVER.

For grain mixed with other—National bank—ultra vires.] Trover lies for grain consigned to a public warehouse, and there mingled with other grain; and where the owner of the warehouse transfers the warehouse and such contents to a National bank, to secure a debt, the latter must respond to such consignors for such grain, irrespective of its chartered authority. *German National Bank v. Meadowcroft* (Ill.), 187.

TRIAL.

See CRIMINAL LAW, 212.

TRUST.

When estate of beneficiary defeated by negligence of trustee — adverse possession.] Lands were conveyed to trustees, their heirs and assigns, to sell sufficient to pay certain debts, and then to lease and support a certain beneficiary for life; the residuum to be held for the benefit of the grantor's heirs at the expiration of the life estate; reserving to the grantors power by appointment or will to direct where the residue should go; the trustees in their discretion, upon request of the grantors, to sell and convey any portion. *Held*, that the trustees took the whole estate, and the beneficiaries only an equitable interest; and that if by the acts or negligence of the trustees the estate of the trustees had been defeated by adverse possession, the interests of the remaindermen were also defeated. *Bennett v. Garlock* (N. Y.), 517.

See TROVER, 137; WILL, 550.

USURY.

See SURETY, 582.

VACANCY.

See INSURANCE, 656.

VENDOR AND PURCHASER.

Destruction of buildings by fire.] Where the owner of land, with valuable buildings on it, contracts to convey it at a future day on payment of a stipulated price, secured by the purchaser's notes presently given, the purchaser presently taking possession, and the buildings are destroyed by fire, without fault of either party, before payment and conveyance, the vendee is not bound to take the land and pay the notes, but the vendor is entitled to the value of the use and occupancy during the vendee's possession. *Gould v. Murch* (Me.), 325.

See FIXTURES, 346.

VOLUNTARY CONVEYANCE.

See FRAUD, 696.

VOTER.

See CONSTITUTIONAL LAW, 736.

WAIVER.

Of demand.] *See* NEGOTIABLE INSTRUMENT, 604.

See INSURANCE, 122.

WAREHOUSEMAN.

See CARRIER, 620; NEGLIGENCE, 263.

WARRANTY.

See DAMAGES, 310; INSURANCE, 72; SALE, 662.

WATER AND WATER-COURSE.

Surface water—concentration and discharge on neighboring lands.] One has no right to concentrate the surface water on his land and discharge it on his neighbor's, although it would naturally flow in that direction. *McCormick v. Kansas City, St. Joseph and Council Bluffs Railroad Co. (Mo.)*, 431.

WIDOW.

Election under husband's will—personal right—insanity.] The statutory right of a widow to elect not to take under her husband's will must be exercised by her personally in her life, and although she was prevented by insanity from making election, yet the right cannot be exercised after death by her representatives. *Crozier's Appeal (Penn. St.)*, 666.

WILL.

1. **Devise—restraint of marriage.]** A devise to the testator's wife, "during her natural life or widowhood," with remainder, "after her death or marriage," to her children, is on condition of remaining unmarried, and is void under the statute as in restraint of marriage. *Stilwell v. Knapper (Ind.)*, 240.
2. **Subscribing witness—interest.]** A subscribing witness to a will, being the son of the testator and receiving but one dollar under the provisions of the will, that being much less than his interest as heir-at-law, is a competent witness to prove the will. *Smalley v. Smalley (Me.)*, 353.
3. **Trust for charity—certainty of object.]** A testamentary trust of property to be divided by the executors "among such Roman Catholic charities, institutions, schools, or churches in the city of New York," as the majority should select, and in such proportions as they should think proper, is valid, there being corporations answering the description and empowered to take. *Power v. Cassidy (N. Y.)*, 550.

See CONSTITUTIONAL LAW, 760.

WITNESS.

1. **Competency of child.]** A negro girl, nine years old, offered as a witness, said in answer to questions to test her competency, that "she did not know what the Bible was; had been to church but once and that was to her mother's funeral; did not know what book it was she laid her hand on when sworn; had heard tell of God, but did not know who it was; and that if she swore to a lie she would be put in jail, but did not know she would be punished in any other way. *Held*, incompetent. *Carter v. State (Ala.)*, 4.
2. **Expert—sanity—Roman Catholic priest.]** A Roman Catholic priest, regularly educated and officiating as such, and required by the duties of

WITNESS — *Continued.*

his office to pass his judgment upon the mental condition of invalids and dying persons, to the end that he may administer the sacraments only to those whose minds are in a proper state to reason or act of their own volition, is an expert as to the sanity of a person whom he so attends. *Estate of Toomes* (Cal.), 88.

To will.] *See* WILL, 353.

See CRIMINAL LAW, 749; EVIDENCE, 733.

WORDS.

"Articles of great intrinsic value."] *See* CARRIER, 370.

"Citizen."] *See* CONTRACT, 536.

"Common sense."] *See* CRIMINAL LAW, 212.

"Head of family."] *See* EXEMPTION, 466, 711.

"Insufficiency or want of repair."] *See* MUNICIPAL CORPORATION, 779.

"Mutual accounts."] *See* LIMITATION OF ACTION, 496.

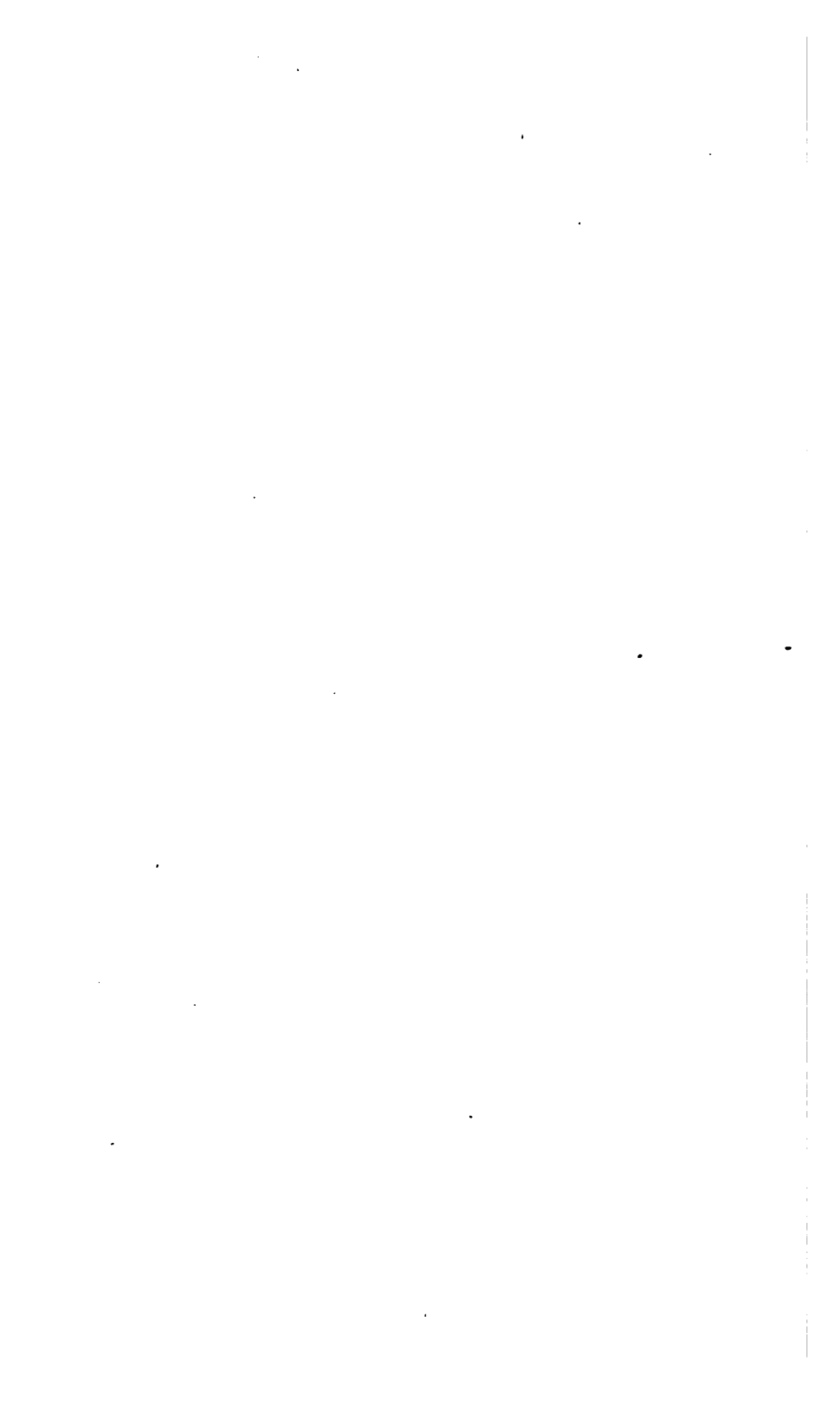
"Open and gross lewdness."] *See* CRIMINAL LAW, 357.

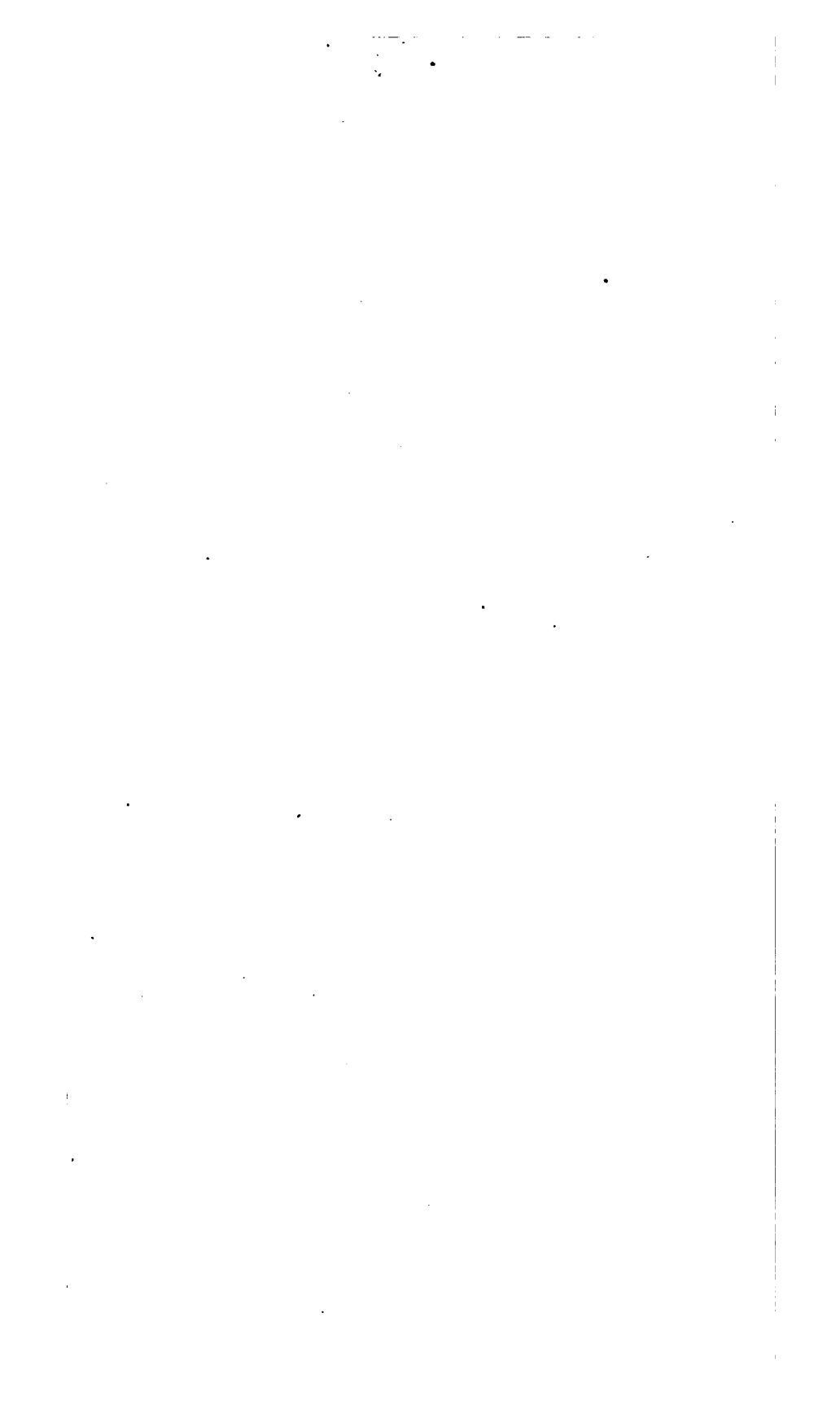
"Projections."] *See* MUNICIPAL CORPORATION, 333.

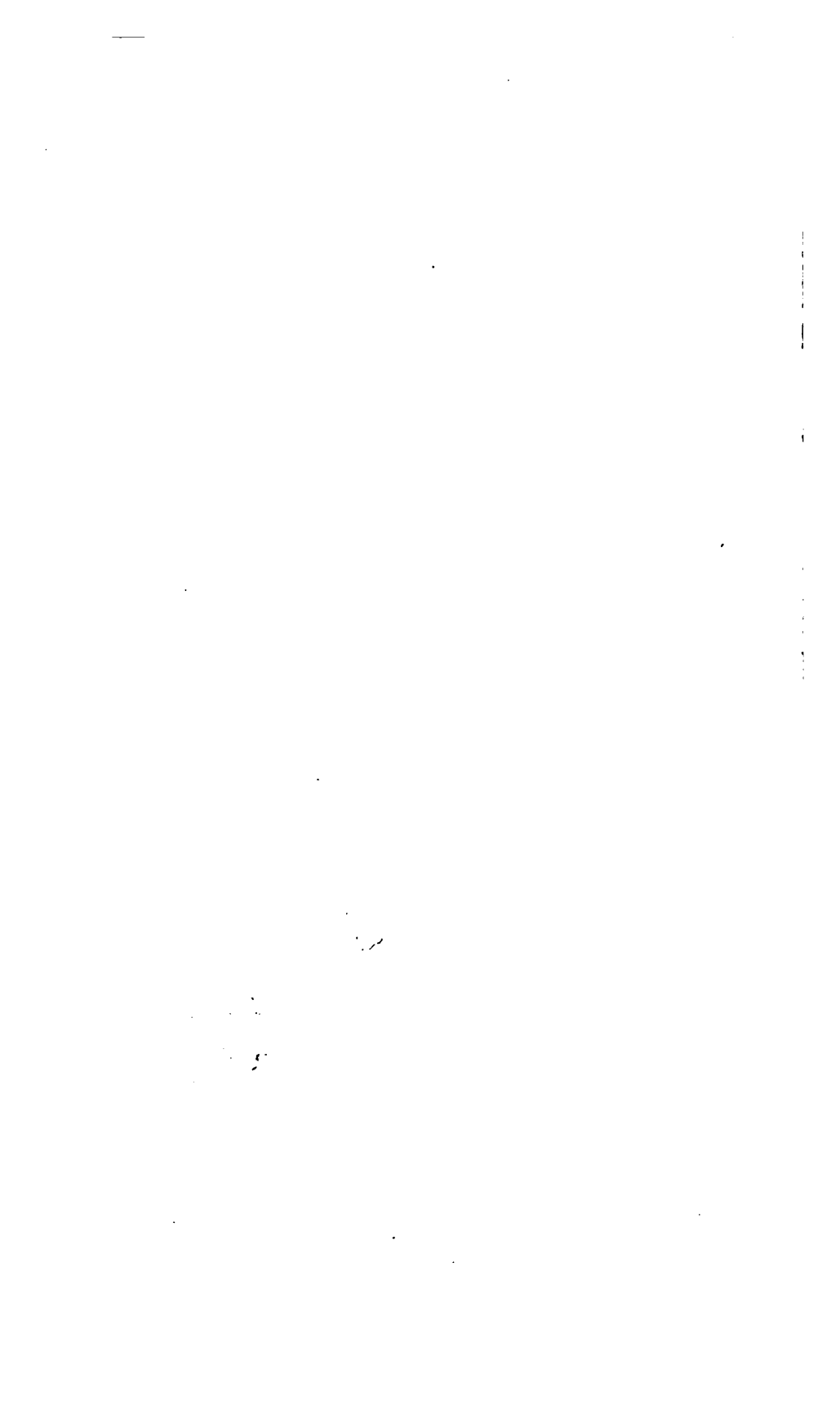
"Total destruction."] *See* INSURANCE, 77.

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